

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No.** CDLA/2323/2017

**Before:** Mr E Mitchell, Judge of the Upper Tribunal

**Decision:** The First-tier Tribunal's decision of 17 March 2017 (ref: *SC 914/16/00732*), involved an error of law. Under section 12(2) of the Tribunal's, Courts and Enforcement Act 2007, the tribunal's decision is **SET ASIDE**. The Appellant's appeal against the Secretary of State's decision of 6 October 2016 is 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 A startling allegation was made by the Appellant's appointee when applying to the Upper Tribunal for permission to appeal against the First-tier Tribunal's decision. The tribunal's statement of reasons showed that it placed particular reliance on the oral evidence of the 14 year old Appellant whose entitlement to Disability Living Allowance was at issue. How could this be when he did not attend the First-tier Tribunal hearing and was in fact in school all day?

2. Startling as this allegation was, there were certain features of the paperwork that were consistent with the Appellant not having attended the hearing. The First-tier Tribunal's attendance sheet made no mention of him. Only the mother (and appointee) and aunt were listed as attendees. The tribunal's record of proceedings did not suggest that the Appellant attended and gave oral evidence. The record contained no section setting out his evidence and the oral evidence that was recorded spoke about him in the third person. Furthermore, the Appellant's headteacher wrote that, on the hearing date, he was at school all day.

3. I decided that the appointee's allegation merited further enquiry. I arranged for Upper Tribunal staff to write to the relevant First-tier Tribunal regional judge and request that he ask the tribunal panel's medical and disability-qualified members as well as the tribunal's clerk, whether they recalled the Appellant attending the hearing. I am grateful to the regional judge, the members and the clerk for their prompt attendance to this enquiry. The presiding judge had already been asked to comment on the appointee's allegation when it was made in her application to the First-tier Tribunal for permission to appeal. The judge disputed the allegation and maintained that the Appellant did attend and give oral evidence.

4. The disability-qualified member wrote:

“I have found my notes for the day but have not recorded whether [the Appellant] was present or not. I have my list of questions for [mother]. They are written as questions to her about the family, behavioural strategies and any SEN...I think it is likely that he was not present but I do not have that fact written in my notes.”

5. The medical member wrote:

“I’m afraid I have no recollection of this case. However, taking evidence from a 14 year old is a very unusual event and I think I would have remembered that. I remember clearly this happening in a different tribunal...On balance I would have to say that I think it unlikely [the Appellant] was present”.

6. The clerk wrote:

“Thank you for sending the [record of proceedings].

It looks as though only the Appointee and the Aunty attended.

If anyone else was present I would have put their name on the [record of proceedings].”

7. The regional judge also decided to seek the views of the judge who presided at the Appellant’s appeal hearing (as mentioned above, the judge had already disputed the appointee’s allegation when made in her application to the First-tier Tribunal for permission to appeal). The judge maintained that he could “still recall the case very clearly” and had, in fact, spoken to the clerk after the hearing to remind her to record the names of all in attendance. The clerk informed the judge that she had indicated the Appellant’s attendance by “circling the Appellant as present on the record of proceedings”. The presiding judge ended with these words:

“I am sure the other panel members will recall the case also. I can say, again, without hesitation, that [the Appellant] was in attendance and gave evidence”.

8. Having obtained the above material, I granted the Appellant permission to appeal to the Upper Tribunal against the First-tier Tribunal’s decision. He clearly had an arguable case that

the First-tier Tribunal erred in law by either relying on non-existent evidence or providing reasons that could not have been the reasons of the three-member panel.

9. The Secretary of State supports this appeal. Her representative submits that the grounds on which permission to appeal was granted are made out.

10. I decide that the First-tier Tribunal's decision involved an error on a point of law.

11. On a balance of probabilities, I have to conclude that the 14 year old Appellant did not attend and give oral evidence before the First-tier Tribunal. The contemporaneous paperwork is more consistent with him not having attended the hearing than having attended. The appointee says he was not there. His head teacher says he was at school all day. Neither tribunal member noted the Appellant's attendance nor remembered it even though, as the medical member observed, it is relatively unusual for a 14 year old to give oral evidence at a hearing. It is the type of event that gets recorded or sticks in the memory.

12. I take into account the presiding judge's very clear assertion that the Appellant attended the hearing. However, that is inconsistent with all the other relevant evidence much of which is given by disinterested third parties. I cannot accept that the presiding judge's recollection is accurate.

13. The reasons for the First-tier Tribunal's decision cannot have been the reasons of the three individuals who constituted the tribunal. They cannot reflect the reasoning of the medical and disability-qualified member. As a result, inadequate reasons were given for the tribunal's decision. I set aside the First-tier Tribunal's decision.

14. The Secretary of State invites the Upper Tribunal to remit the Appellant's appeal against her decision of 6 October 2016 to the First-tier Tribunal for re-determination. The appointee has not disputed this invitation. I accept the Secretary of State's invitation. I am clearly not in a position to re-decide the appeal made to the First-tier Tribunal. The Appellant's appeal will now be determined afresh before a differently-constituted First-tier Tribunal.

### **Directions**

I direct as follows

- (1) The Appellant's appeal against the Secretary of State's decisions of 6 October 2016 is remitted to the First-tier Tribunal for re-determination.

- (2) The appeal is to be determined by a differently-constituted panel.
- (3) The Tribunal is to hold a hearing before determining the Appellant's appeal.
- (4) If the appointee wishes to rely on any further documentary evidence or argument, it is to be received by the First-tier Tribunal within **one month** of the date on which this decision is issued.
- (5) Upon receipt of the tribunal file, First-tier Tribunal staff are to place it before the regional tribunal judge for him to consider whether any further case management directions are required.

**Directions (3) and (4) may be varied by direction given by the First-tier Tribunal.**

**The appointee is reminded that the law prevents the tribunal from taking into account circumstances that did not exist at 6 October 2016, when the decision under appeal was taken (section 12 of the Social Security Act 1998). Evidence generated after that date may be taken into account if it is relevant to the circumstances at 6 October 2016.**

**(Signed on the Original)**

E Mitchell

**Judge of the Upper Tribunal**

**19 September 2018**