



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**UPPER TRIBUNAL CASE NO: UA-2023-000041-PIP
[2023] UKUT 121 (AAC)**

PW BY HIS APPOINTEE V SECRETARY OF STATE FOR WORK AND PENSIONS

Decided without a hearing

Representatives

PW His mother and appointee
Secretary of State DMA, Leeds

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference: SC309/20/00841 1605536487958599
Decision date: 19 January 2022
Hearing: Derby

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

- 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. In particular, the tribunal must investigate and decide the claimant's entitlement to a personal independence payment on his claim that was made on 8 August 2020 from the effective date of 9 September 2020.
- D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later

evidence is admissible, provided that it relates to the time of the decision: R(DLA) 2 and 3/01.

- E. The tribunal at the rehearing will benefit from reading the submission to the Upper Tribunal from the Secretary of State's representative, dated 12 April 2023.

REASONS FOR DECISION

1. This case is about evidence that a claimant has a 'learning disability' and how the tribunal should have dealt with that evidence.

A. The claim for a personal independence payment

2. The claimant was receiving an award of disability living allowance consisting of the mobility component at the lower rate and the care component at the lowest rate, when he was invited to make a claim for a personal independence payment. This he did on 14 January 2020. The Secretary of State refused the claim on 8 August 2020 and terminated the award of disability living allowance from and including 9 September 2020.

B. The appeal to the First-tier Tribunal

3. The claimant exercised his right of appeal to the First-tier Tribunal. The letter of appeal was written by his mother and covered six pages. She used the term 'cognitive impairment' several times. Unless I have missed it, she did not use the term 'learning difficulties'.

4. The evidence before the tribunal included two letters dated 16 September 2021 and 21 December 2021 from Adult Neurodevelopmental Services at Derbyshire Healthcare. The December letter read in part:

[PW's] GP referred him to our service with concerns including significant dependence on his mother.

[PW] attended for an Eligibility Assessment on 13th September 2021, supported by his mother.

Our assessment concluded that [he] does have a significant learning disability and needs a significant amount of support in most areas of his life. He is on our waiting lists for assessments by Speech and Language Therapy and Occupational Therapy.

...

... [PW] is now on the learning disability register.

5. The tribunal awarded a personal independence payment consisting of the daily living component at the standard rate for four years. The award did not include either rate of the mobility component. I will quote some parts of the tribunal's decision notice and written reasons that will be relevant later.

6. In the decision notice, the judge wrote:

PW has a number of medical problems, the most significant of which are COPD and some learning difficulties. ... His learning difficulties limit his ability to cook, to read, to engage with others, and to budget. Points are therefore awarded for these activities.

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The claimant scored two points for each of those activities, which led to his award.

7. In the tribunal's written reasons, the judge wrote:

3. ... There was a lengthy appeal letter. The appeal referred to both learning difficulties and COPD.

7. ... Also available were two letters from the Adult Learning Disability Service, from September and December 2021, which confirmed that he had a learning disability. ...

9. The tribunal accepted that the appellant has a learning disability, and receives a very high level of support from his mother, with a range of daily living activities. He also has mental health problems, and is on a high dose of Mirtazapine. An assessment in May 2020 had found his mood to be stable, with no thoughts of self-harm. By the time of the hearing the appellant said that he had stopped taking the Mirtazapine, and his sleeping had improved. In relation to the learning difficulties, he was awaiting an assessment. ...

C. The grounds of appeal

8. The claimant's mother provided an 11 page letter in support of the application for permission to appeal. It began with five paragraphs identifying the errors of law, followed by a detailed critique of the tribunal's reasoning. Among the grounds was this:

Despite the evidence on [pages H2 and H3] stating that PW has a 'Significant Learning Disability and needs a significant amount of support in all area's of his life', not once does the Decision Notice state this but when I tried to draw the tribunal's attention to this document and the amount of support that was required, I was rudely interrupted before I had finished speaking. The Decision Notice continually refers to PW's Learning Disability as a Learning Difficulty which is wrong. Throughout the SoR [statement of reasons] too, the words Learning Difficulty appears four times, yet the correct words Learning Disability appears just once. The difference may not appear to be all that important to most people, but there is a huge clinical difference which is why after the hearing, I submitted a copy of a letter I'd received from the Adult Neurodevelopmental Services dated 08/02/22 which I thought may be helpful. It explains that the two terms get used interchangeably but are very very different. A Learning Difficulty is any learning or emotional problem, that affects, or substantially affects, a persons ability to learn, get along with others or follow convention. A Learning Disability, is a significant, lifelong condition, that starts before adulthood, affects development, and leads to help being required to (a) Understand Information, (b) Learn Skills, (c) Cope Independently. The NHS definition of a Learning Disability implies an IQ below 70, and only affects 2% of the population, often getting confused with other conditions. I knew the letter could not be submitted to be considered as evidence, but I thought it may have helped the Tribunal Judge to understand the difference when preparing his SoR, especially as it was so important for this document to be accurate and correct in every detail for the appeal to be successful. Disappointingly from the wording in the SoR it would appear it was not even looked at.

Having read that, I did some research on the internet. I found sites that treated the learning disability and learning difficulties as synonymous and others that distinguished between

UPPER TRIBUNAL CASE NO: UA-2023-000041-PIP
[2023] UKUT 121 (AAC)

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them in different ways. I could not find a site that was authoritative or any practice that was definitive or standard.

D. The grant of permission to appeal

9. I gave permission to appeal and directed the Secretary of State's representative to make a submission on the ground I have quoted and suggested they might wish to take medical advice. The representative did so and set out the response in her submission:

Regarding the differentiation between learning disability and learning difficulty – unfortunately there is a lack of consistency in use of the terms, and they are often used interchangeably. The actual diagnosis should not be paramount when assessing for PIP – if the functional assessment has been done thoroughly then the correct outcome should have been achieved, however the underlying diagnosis can be useful in guiding the HealthCare Professional and Case Manager as to likely difficulties the claimant would be expected to experience. Ultimately the functioning against the PIP activities will determine the award outcome, so long as the functioning is adequately explored.

E. Why a diagnosis may be relevant

10. It is not necessary to have a diagnosis of a particular condition in order to qualify for a personal independence payment. It may, though, be relevant to entitlement. It may operate to the claimant's advantage or disadvantage.

11. A claimant's entitlement depends on them showing that their activities are limited by their 'physical or mental condition': section 80(1) of the Welfare Reform Act 2012. A diagnosis of a particular condition is evidence that they have a condition. It may be the best or only evidence they have.

12. It is not sufficient for a claimant to have a physical or mental condition. They must also score sufficient points under the descriptors for the activities listed in Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (SI No 377). This will determine whether they qualify for the daily living component or the mobility component and, if they do, at what rate. A diagnosis of a particular condition is relevant evidence in deciding whether their limitations are likely to arise from their 'physical or mental condition'. It may allow the tribunal to assess the reliability of the claimant's evidence about the effect of their condition. It may also allow the tribunal to draw inferences about the nature and extent of the claimant's limitations in the absence of evidence.

13. The particular diagnosis may not affect the outcome of the case. It may not be necessary to distinguish between diagnoses. It will only matter if the diagnosis affects the analysis of the claimant's limitations. This case presents the difficulty that the evidence used different terms, but it is not clear how those terms were being used.

14. It is easy to be wise after the event, but the record shows that the tribunal did not appreciate the importance of distinguishing between evidence of learning difficulties and learning disability. First, it referred to the letter of appeal to the First-tier Tribunal as mentioning learning difficulties, when the claimant's mother had referred to cognitive impairment, which she was distinguishing from learning difficulties. Second, the decision notice shows that the tribunal made its award on the basis that the claimant had learning

difficulties. Third, it found that the claimant had a learning disability. The language of the finding shows that the tribunal relied on the evidence from the Adult Neurodevelopmental Services. Fourth, the tribunal found that the claimant was awaiting an assessment for his learning difficulties, when that assessment related to his learning disability. The best sense I can make of the tribunal's reasoning as a whole is that it either: (a) treated the two terms as interchangeable; or (b) considered that there was no difference between them, or no practical difference for the purposes of entitlement.

15. I would identify the error of law in this way. The evidence contained references to both learning difficulties and learning disability. These terms are used differently, with no consistent practice or authoritative meaning. The argument from the claimant's mother relied on her son having a disability, which she saw as indicative of the nature and range of his limitations. The tribunal should have clarified what she meant in order to understand her argument. It should have kept the different in mind when taking and assessing evidence from the claimant and his mother. It should have tried to identify the way in which those terms were used in the documentary evidence.

F. Why there must be a rehearing before the First-tier Tribunal

16. The claimant's mother has asked the Upper Tribunal to re-make the decision rather than remit the case for rehearing by the First-tier Tribunal. She has said that 'the evidence confirms that the facts are already established.' I do not accept that. As I have explained, there is uncertainty in the evidence and this may have affected the outcome. There needs to be a rehearing so that a different panel can understand the argument she is making for the claimant, and can obtain and analyse the evidence necessary to decide the case. The panel's combination of legal, medical and practical experience of disability will make it ideally suited to carry out that exercise.

G. The rehearing

17. For the benefit of the claimant's mother, this is the effect of the decision in *KK* to which I have referred in my directions.

18. The tribunal must follow the directions I have given.

19. 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.

20. Nor will the tribunal be limited to the evidence and submissions that were before the tribunal at the previous hearing. It will decide the case on the basis of the relevant evidence and submissions made at the rehearing.

21. The tribunal must come to its own conclusions on the issues of both fact and law that it considers. Nothing in my decision or in my reasons for it is an indication of the likely outcome of the rehearing. Nor will the tribunal be bound by any conclusions of fact or law reached by the tribunal in the decision that I have set aside.

**Authorised for issue
on 22 May 2023**

**Edward Jacobs
Upper Tribunal Judge**