Appeal No. *UA-2024-000182-PIP*
[2024] UKUT 173 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

NH

Appellant

- v -

Secretary of State for Work and Pensions

Respondent

On appeal from/judicial review of:

Tribunal: First-Tier Tribunal (Social Entitlement Chamber)
Tribunal Case No: SC242/23/01516
Digital Case No.: 1666599698356304
Tribunal Venue: Fox Court (in person)
Decision Date: 3 May 2023

Before: Upper Tribunal Judge Stout

Decision date: 13 June 2024
Decided on consideration of the papers

Representation:

Appellant: Islington Law Centre
Respondent: L Ropel (DWP Decision-Making and Appeals)

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant in these proceedings.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal was made in error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

DIRECTIONS

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.**
2. **The new First-tier Tribunal should not involve the tribunal judge, medical member or disability member previously involved in considering this appeal on 3 May 2023.**
3. **The appellant is reminded that the new First-tier Tribunal can only consider the appeal by reference to their health and other circumstances as they were at the date of the original decision by the Secretary of State under appeal (namely 3 May 2022).**
4. **The new First-tier Tribunal will be dealing with appellant's entitlement to PIP during the closed period from 5 January 2022 (date of claim) to 25 January 2024 (when the Secretary of State made a new decision that the appellant was not entitled to PIP).**
5. **If the appellant has any further written evidence to put before the First-tier Tribunal relating to that period, including any further medical evidence, this should be sent to the relevant HMCTS regional tribunal office within one month of the issue of this decision.**
6. **The new First-tier Tribunal is not bound in any way by the decision of the previous tribunal. Depending on the findings of fact it makes, the new tribunal may reach the same or a different outcome to the previous tribunal.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. The appellant has an artificial right eye and other vision difficulties. She also suffers from anxiety and depression. She appeals against the First-tier Tribunal's decision of 3 May 2023 refusing her appeal against the decision of the Secretary of State of 3 May 2022 that she was not entitled to Personal Independence Payment (PIP) under Part 4 of the Welfare Reform Act 2012 (WRA 2012) and The Social Security (Personal Independence Payment) Regulations 2013 (SI 2013/377) (the PIP Regulations) from 5 January 2022 (the date of claim).

2. The First-tier Tribunal's Statement of Reasons (SoR) was issued on 30 May 2023 and permission to appeal was refused by the First-tier Tribunal in a decision issued on 8 January 2024. The appellant (through her representatives) filed the notice of appeal to the Upper Tribunal on 7 February 2023 (in time). I granted permission to appeal in a decision issued on 13 April 2024.

3. The Secretary of State by submissions dated 1 May 2024 supports the appeal and consented to me dealing with the appeal on the papers 'without reasons'. The appellant agrees that I can deal with the appeal on the papers, but invites me to give a reasoned (published) decision on the basis that one of the issues raised on the appeal as to the use the Tribunal made of generic information on the Royal National Institute for the Blind (RNIB) website is potentially of wider importance. Given the temptation that many Tribunal judges and members may face to make use of the internet when considering cases, I agree with the Appellant and am giving these brief reasons and publishing the decision accordingly.

What has gone wrong in this case

4. The appellant has an artificial right eye which was put in in 2015 and a watery left eye. Without glasses the appellant has very poor vision which is blurry. The appellant also suffers from anxiety and depression and consequently avoids social situations (see page 113 of the First-tier Tribunal bundle).

5. The Secretary of State in this case awarded the appellant 2 points on daily living activity 8 (reading) and 0 (zero points) on the mobility activities. The First-tier Tribunal allowed the appellant's appeal in part and awarded the appellant 2 points on daily living activities but these were 2 points for daily living activity 9 (engaging with other people face to face) and 4 points on mobility activity 1 (planning and following journeys). These points were still insufficient to entitle her to an award of PIP, her appeal was dismissed.

6. The parties are in agreement that there were two clear errors in the Decision Notice as it does not match the SoR:

   a. The SoR accepted the 2 points that the Secretary of State had awarded the appellant for needing an aid for reading, but did not include this in the Decision Notice. This was a mistake and 2 additional points should have been included in the Decision Notice for this activity, bringing the daily living activities score to a total of 4 points;

   b. The Decision Notice awarded 2 points for activity 9 (engaging with other people face to face) explaining "By reason of low mood [the appellant] struggles to go out and to engage with other people to an acceptable standard". However, the SoR awards the appellant no points for this activity, with reasoning that contradicts the reasons given in the Decision Notice. I infer that the Decision Notice properly reflects the decision made on the day, together with the reasons for it and that these were forgotten/overlooked when the SoR was written up.

7. These are, of course, errors of law in themselves, but they are not by themselves material errors as even with 4 points for daily living activities the appellant would not have been entitled to an award of PIP. However, with the parties' agreement, I have considered the materiality of the other grounds of appeal on the basis that the First-tier Tribunal's decision should be treated as a decision to award the appellant 4 points on the daily living activities and 4 points on mobility activity 1.

8. There are then two other grounds of appeal as follows.

9. Ground 1 is that the First-tier Tribunal failed to make adequate findings of fact regarding the nature and extent of the appellant's visual ability. The appellant in particular complains that the First-tier Tribunal has relied on material on the RNIB website, part of which it has copied into its decision almost verbatim in order to conclude that the appellant, as a person who lost one eye some time ago, should now be regarded as having functionally near-normal vision requiring only minor adjustments to carry out a variety of everyday tasks. The appellant complains that: (i) the information on the RNIB website was not put to the appellant at the hearing so she did not have an opportunity to comment on it; (ii) the First-tier Tribunal has been selective in the material it has used from the RNIB website and has ignored other information on the RNIB website that illustrates that people with monocular vision may have a need for assistance in unfamiliar or crowded environments or when moving about outside; and (iii) the First-tier Tribunal has failed to make findings about how the condition actually affects the appellant.

10. In this case, while the First-tier Tribunal did make some findings of fact regarding the nature and extent of the appellant's visual ability, I agree that the decision is in error of law in terms of the use that the Tribunal has made of the material on the RNIB website. The Tribunal does at [9], [10], [16]-[17], [20] and [22] make findings about the appellant's eyesight, the effect of glasses, the fact that she is not registered blind or partially sighted, and does not use a white cane. The Tribunal also made findings about what she can see when out and about in terms of cars and public transport, finding that she could see in front of her, and see 'the big bus number when it is in front of her' and only occasionally bumps into things while walking. There is no problem with any of these findings in principle, which on their face comply with the guidance on cases of claimants with visual difficulties given by Judge Rowland in *KS v SSWP (PIP)* [2017] UKUT 456 (AAC). However, the Tribunal then went on at [23] to [25] as follows:-

> 23. In the expert medical opinion of the Tribunal the removal of one eye can initially cause some problems for people with things like depth perception (judging steps or correctly gauging how to pour liquid into a cup for example) and not having the field of vision on the affected side that you are used to (what you can see to the sides when looking straight ahead) but natural adjustment usually happens over time. Our brains are very adaptable and able to adjust to this change in vision. Usually, people find that with time their good eye "takes over" and that tasks that were previously difficult become easier. It's very difficult to say how long this adjustment will take as this is very individual. However, once someone has adjusted to monocular vision, they find

> that they are able to read, watch television and perform many day-to-day activities without any problems. It is possible to drive with vision in only one eye provided the remaining eye reaches the required standard of vision.
>
> 24. Reasonable adjustments that a person with monocular vision can make are: When putting a drink down, place the other hand on the table or surface, then place the drink next to it. When pouring liquid, gently rest the lip of the container on the rim of the cup or glass. It can be difficult to judge the last step on the staircase. Move cautiously, feel ahead with your foot and keep a hand on the banister or handrail. When crossing the road, to stop at the kerb for a while to gauge the depth of the kerb and the distance of vehicles before crossing. None of these adjustments require specific aids.
>
> 25. You can shower, swim and ski with a prosthetic eye.

11. The difficulty with these paragraphs is that the Tribunal has taken them very largely from text on the RNIB's website, and did so without (the parties agree) putting the content of the paragraphs to the appellant and giving her an opportunity to comment on them. It is well established that where a Tribunal uses its specialist knowledge or expertise to decide an issue, fairness will normally require it to give the parties an opportunity to comment on its thinking and to challenge it: *R (L) v London Borough of Waltham Forest* [2003] EWHC 2907 (Admin), [2004] ELR 161. See also *MB v Department for Social Development (II)* [2010] NICom 133, C1/10-11(II) at [14] and *Harrow LBC v AM* [2013] UKUT 0157 (AAC), [2013] ELR 351. That, it seems to me, is even more important where, as appears to have happened in this case, the specialist tribunal is not truly using its own expertise but material from a website that it has not shared with the appellant. The fact that the Tribunal has made selective use of the website material, ignoring the passages from the website that support the appellants' case as to her need for assistance, increases the unfairness in this case.

12. It seems to me that the Tribunal's use of the RNIB website material undermines the ostensibly unobjectionable findings that it made earlier in the decision about the appellants' visual abilities. Further, when going on to consider the appellants' abilities by reference to the various activities, it seems to me that the First-tier Tribunal has predominantly relied on the website material rather than making findings about the actual impact of monocular vision on the appellant (in combination with her anxiety/depression). Thus, when dealing with mobility activity 1 the First-tier Tribunal has proceeded on the basis that her vision does not affect her ability to follow a route. The same issue has, it seems to me, probably affected the First-tier Tribunal's consideration of daily living activity 1 (preparing food) and activity 9 (engaging face to face).

13. The second ground of appeal (which comprises a number of sub-points) is that the appellant argues that the Tribunal has, when considering activity 1 (preparing food), wrongly proceeded on the basis that the appellant has not cut herself when cooking (that being what is recorded in the healthcare practitioner (HCP) assessment), when her oral evidence to the panel was that she <u>has</u> cut herself when cooking (and has done so without explaining why her oral evidence was

rejected). The appellant also complains that the panel failed to explain to the appellant what activities are involved in 'the cooking test' (i.e. preparing a cooked one-course meal for one using fresh ingredients: Sch 1, para 1), and that the First-tier Tribunal erred in reasoning from the fact that the appellant had not had any accidents carrying out these activities recently that she could do them safely, when the evidence was that she had not been doing the activities because she does not feel she can do them safely.

14. Save that it is not necessary on this appeal for me to consider the appellant's ground of appeal relating to whether the panel properly explained the cooking test to her, I agree that the First-tier Tribunal has committed these errors in this case.

15. At [12] and [30] of the SoR the Tribunal states:

> "She has never cut herself but has burned herself a few times by accident because she didn't see."
>
> "The Tribunal carefully considered the risk to her of the activity of cooking and the possibility of burns or cuts to her skin. However, she has never cut herself and had burnt herself only very occasionally and there were not major incidents. Therefore, it was considered that she was not at risk cooking and could carry out this activity safely, to an acceptable standard, repeatedly, within a reasonable time scale the majority of days with no aids or assistance."

16. The Tribunal in these passages relied on the evidence submitted within the HCP report without explaining why it had rejected the appellant's oral evidence, which was consistent with what she had stated in her PIP2 questionnaire which was as follows:

> "I've not been able to cook for myself as an adult. I have an artificial eye (right eye). I have limited vision in my left eye. My left eye waters and discharges… I have difficulties chopping so this I can't do. Sometimes I can't see things at all. Both my hands get bruised and cut when I'm out and would get cut if I tried to chop food. I have cold food or a takeaway, or ready meal I can heat up in the microwave. I'd need at least supervision or assistance to cook, but really I couldn't cook at all." *[page 85]*
>
> "I have difficulties judging distance so chopping I can't do" *[page 84]*

17. The Tribunal's reasons were thus inadequate as they fail to explain why the appellant has 'lost' on this point.

18. The Tribunal has also failed properly to address the question of whether the appellant can carry out the activities "safely" as required by regulation 4(2A) of the PIP Regulations, as defined in regulation 4(4)(a) as follows:

> "safely' means in a manner unlikely to cause harm to [the appellant] or to another person, either during or after completion of the activity".

19. In *RJ v SSWP (PIP)* [2017] UKUT 105 (AAC); [2017] AACR 32 the Upper Tribunal held:

> 56 "An assessment that an activity cannot be carried out safely does not require that the occurrence of harm is "more likely than not". In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant."

20. Although in general terms the Tribunal's reasons indicate that it was aware of the need to approach the question of safety consistently with that guidance, its reasoning in this case on the question of safety was in my judgment perverse and thus in error of law in relation to daily living activity 1 (preparing food), daily living activity 9 (engaging face to face) and mobility activity 1 (planning and following journeys). The First-tier Tribunal erred in reasoning from the fact that the appellant had not had any accidents carrying out these activities recently that she could do them safely, when her evidence (which was not rejected by the Tribunal) was that she has not been preparing food from fresh, or engaging socially or following unfamiliar journeys save on the most minimal basis for some time because of her conditions. If she had been doing these activities without recent incident, there would be nothing wrong with the Tribunal's reasoning, but as she has not it is perverse for it to have relied on the absence of accidents as evidence that she could do the activities safely.

21. The Secretary of State in his submissions has drawn attention to the following evidence in the bundle which was directly relevant to this point, but which the Tribunal must, it seems to me, have failed to take into account when reaching its conclusions on the issue of safety:

> "She never cooks, for meals she will get a takeaway, she will go and buy shopping for one week. She will buy ready meals and sandwiches easy to make and grab." *[page 114]*
>
> "… I avoid people. I can't recognise individual people if there's a group, even with my glasses." *[page 101]*
>
> "She doesn't like talking to strangers because she doesn't like to speak too much with people. likes to avoid them and be on her own. Inside she feels different, feels like she is not normal inside. Finds it ok to engage with people in the shop at the checkout. When she goes to the college she says she will find it ok to engage with people in her class. She doesn't mind just saying hello to people but doesn't like long conversations. She only ever goes out on her own not with anyone else. Reports she has not had any counselling in her life. If she had someone with her says it would be the same and not any better. Says she doesn't hate people but she doesn't feel comfortable with talking to people, still in her mind form her childhood, still thinking people will say things to her about her eye." *[page 115]*

''I only really go to my local Tesco's plus when I need it, local, clothes shop. I can't read an A-Z map – it's too small. I can't see it; plus it makes my eye water too. If I'm on the bus I have to listen to announcements, but its scary on the bus it moves fast and jerky; or if it gets busy. Going upstairs is difficult as is judging to grab handles. I get lost when I go places – many times/ I need someone with me to go unfamiliar places – but also, I've been able to go hardly anywhere, so I really need people to go to familiar places too. It makes me anxious being out; my eye waters outside which makes my vision worse. I can't manage where there are people… If things change on my journey this is very difficult for me to manage.*" [pages 105-108]*

"She will go to a shop if she needs shopping, once a week. She will be going to college and will do shopping in the same day. She will be doing this journey on her own, she says it is good for her to get out. Says she doesn't go outside her flat for a walk, she doesn't go outside too much because she feels anxious." *[pages 115-116]*

What happens next: the new First-tier Tribunal

22. I therefore conclude that the decision of the First-tier Tribunal involves errors of law. I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The case must (under section 12(2)(b)(i)) be remitted for re-hearing by a new tribunal subject to the directions above.

23. There will need to be a fresh hearing of the appeal before a new First-tier Tribunal. Although I am setting aside the previous Tribunal's decision, I am making no finding, nor indeed expressing any view, on whether the appellant is entitled to PIP (and, if so, which component(s) and at what rate(s)). That is a matter for the judgment of the new Tribunal. That new Tribunal must review all the relevant evidence and make its own findings of fact.

24. In doing so, the new Tribunal will have to focus on the appellant's circumstances as they were at the time of the decision on 3 May 2022. This is because the new Tribunal must have regard to the rule that a tribunal "shall not take into account any circumstances not obtaining at the time when the decision appealed against was made" (section 12(8)(b) of the Social Security Act 1998).

25. As the Secretary of State has made a subsequent decision that the appellant is not entitled to PIP, the new First-tier Tribunal will be dealing with appellant's entitlement to PIP during the closed period from the date of claim in this case to the date of the Secretary of State's new decision, i.e. 5 January 2022 (date of claim) to 25 January 2024.

Judge Stout
Judge of the Upper Tribunal

Authorised for issue on 13 June 2024