

IN THE UPPER TRIBUNAL

Case No: CE/3723/2016

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

## DECISION

**I consent to the Secretary of State's application to withdraw his appeal from the Upper Tribunal.**

***A copy of this decision is to be placed on the Upper Tribunal Administrative Appeal Chamber's website.***

## REASONS FOR DECISION

1. This appeal came before the Upper Tribunal on appeal from a First-tier Tribunal's decision dated 23 August 2016. By that decision the First-tier Tribunal allowed the claimant's appeal. It found that the claimant had limited capability for work as she satisfied descriptor 8b in Schedule 2 to the Employment and Support Allowance Regulations 2008 ("the ESA Regs") on account of Meniere's disease.
2. Activity 8 is concerned with "Navigation and maintaining safety, using a guide dog or other aid if either or both are normally, or could reasonably be, used". Descriptor 8(b) in that activity carries on its own an award of the required fifteen points and is met if a claimant "Cannot safely complete a potentially hazardous task such as crossing a road, without being accompanied by another person, due to sensory impairment".
3. The First-tier Tribunal found that descriptor 8(b) was satisfied because the claimant had problems with dizziness as a result of the Meniere's disease. This dizziness affected her balance and gave her constant motion sickness when walking. Turning her head to check for traffic when crossing the road was a particular problem in this regard. As a result the First-tier Tribunal found that the claimant needed to be

accompanied when walking because of being prone to falling and veering off course. The tribunal used its medical expertise to conclude that the known effects of Meniere's disease amounted to a sensory impairment. It was for all these reasons that it found descriptor 8(b) was met.

4. The Secretary of State was, however, dissatisfied with this result. He sought and was given permission to appeal by the First-tier Tribunal. In giving directions on the appeal I made the following observations:

"Permission to appeal was granted to the Secretary of State by District Tribunal Judge Bird of the First-tier Tribunal on 16 November 2016. As described by Judge Bird, I think fairly, the ground of appeal is whether the effects of Meniere's disease can fall to be taken into account under activity 8 in Schedule 2 to the Employment and Support Allowance Regulations 2008 ("the ESA Regs"), and more particularly as a sensory impairment within descriptor 8b under that activity.

Activity 8 is concerned with "Navigation and maintaining safety, using a guide dog or other aid if either or both are normally, or could reasonably be, used". The First-tier Tribunal found descriptor 8b was met. This provides that 15 points are to be awarded if a person "[c]annot safely complete a potentially hazardous journey such as crossing the road, without being accompanied by another person, due to sensory impairment". It found this descriptor was met because [the claimant's] Meniere's disease led to dizziness and balance problems and constant motion sickness, and this caused her to need to be accompanied when walking outdoors because of her proneness to falling and veering off course. Crossing the road was a particular problem because of the need for her to turn her head which led to dizziness. This amounted to a sensory impairment.

The Secretary of State disputes on this appeal whether the claimant's inability to navigate (as in crossing the road) arises from a sensory impairment. He argues that a sensory impairment is where the five senses are affected, that is, sight, sound, smell, taste and touch, (I take it he accepts that only one sense needs to be affected). His argument is that vertigo arising from Meniere's disease is not a sensory impairment as required by descriptor 8b.

I am not entirely clear as to the scope of the Secretary of State's argument. For example, the tribunal arguably found as a fact that [the claimant] had a sensory impairment because her senses were being affected and impaired by dizziness/vertigo. Why was this finding of fact not one which it was open to it to make? And given what the GP said on page 119 about [the claimant]'s sight being affected ("eyes often flicker at times"), why was this not a rational finding on the evidence?

The answer would seem to be, on the Secretary of State's argument, that as a matter of **law** "sensory impairment" in descriptor 8b cannot encompass vertigo of the type from which [the claimant] suffers (but even if that is the case legally it might not overcome the GP's evidence referred to above). If, however, the senses are affected by vertigo why does this not amount to sensory impairment? Does the language used necessarily connote a direct impairment of (one of) the five senses, such as loss of vision or loss of hearing, or is it wide enough to cover where the senses are indirectly affected by, here, severe vertigo? There seems no dispute in this case that [the claimant] was unable to safely cross a road on her own without another person, and so otherwise met the functional aspects of descriptor 8b.

The previous version of activity was limited to vision. The reasons for the change to the current version of activity 8 and its descriptors on 28 January 2013 may be relevant to understanding what is meant by "due to sensory impairment". Such evidence should be provided by the Secretary of State."

5. The claimant then provided her observations on the appeal in which she supported the First-tier Tribunal's decision. The Secretary of State sought extra time to provide his submission in reply but prior to that extra time expiring he filed a short response in which he limited himself to saying that in the light of medical advice he had received he wished to withdraw his appeal. This caused me to issue the following directions in which I said the following.

"Appeals by the Secretary of State to the Upper Tribunal are not common occurrences and are usually reserved for important cases. I assume that this was considered to be such a case. On the face of the grounds of appeal, this appeal involves an important issue of law about the scope [of] the phrase "due to sensory impairment" in the descriptors under activity 8 in Schedule 2 to the Employment and Support Allowance Regulations 2008. I sought to highlight some matters that may be involved in resolving this issue in my observations on the appeal of 21 March 2017.

Given the potential importance of the point raised by the appeal, it is in my judgment unsatisfactory for consent to it being withdrawn being sought on what is essentially an unreasoned basis.

The reasoning (or concession, if that is the right word) by the Secretary of State as to why this appeal was correctly allowed by the First-tier Tribunal on activity 8 may well not bind any other tribunal, even if set out in narrative form in a decision of the Upper Tribunal consenting to the appeal being withdrawn. However, it would, it seems to me, be helpful for the fact of the concession and the reasons for it to be made publicly available to others as evidence of what the Secretary of State's view is of the scope of activity 8.

In these circumstances, I do not consider it is appropriate for me to seek [the claimant]’s views on the appeal being withdrawn and then for me to give consideration as to whether to consent to this appeal being withdrawn until the Secretary of State has explained why he wishes to withdraw his appeal in this case and why he considers the First-tier Tribunal was correct to award descriptor 8b.

Once the Secretary of State has supplied the above reasoning, I will then seek the views of [the claimant] on whether she has any objection to the appeal being withdrawn.

Depending on the content of the Secretary of State’s reasons as to why he wishes to withdraw this appeal and why he considers [the claimant] was correctly found to satisfy descriptor 8b, it may be that any narrative decision I may make consenting to the appeal being withdrawn will be made publicly available on the UT(AAC)’s website. (A similar approach was recently taken in *SSWP –v- AR (rule 17) (JSA)* [2017] UKUT 0148 (AAC). The parties may therefore wish to address this as well when making the submissions directed below.”

6. The Secretary of State then filed a more detailed response. I set it out in full below. (The claimant subsequently filed a letter in which she said she was content for the Secretary of State’s appeal to be withdrawn and had no objection to the ‘consenting to withdraw’ decision appearing on UT(AAC)’s website.)

### **“RESPONSE TO DIRECTIONS**

1. The Upper Tribunal (“UT”) Judge directs me to provide an explanation of why the Secretary of State wishes to withdraw the appeal, why it is accepted that the claimant satisfies descriptor 8(b) of Schedule 2 to the ESA Regulations, and whether there is any objection to any decision consenting to the withdrawal being placed on the UT website.

2. The Secretary of State’s appeal was based on the standard dictionary definition of what constitutes a sensory impairment, i.e. an impairment of the five physical senses of sight, hearing, smell, taste and touch; see for example the attached link to the on-line Cambridge English dictionary:

<http://dictionary.cambridge.org/dictionary/english/sense>

3. Before the amendments to Schedule 2 made from 28.3.11, the Activity descriptors which were replaced by Activities 6, 7 and 8 were considered to focus on the impairment of speech, vision and hearing, rather than the disability the impairment led to; see paragraph 4.3.3 of the DWP Internal Review of the Work Capability Assessment published in October 2009.

<http://webarchive.nationalarchives.gov.uk/20121005160842/http://www.dwp.gov.uk/docs/work-capability-assessment-review.pdf>

Although speech is not a sensory function, it was included in this section as a way of grouping together functional difficulties with communication and navigation.

4. The intention behind what became Activity 8 was that it should reflect functional difficulties with navigation and maintaining safety arising from visual impairment and consequential problems such as confidence and training. It was not intended to extend to problems with balance.

5. However, on receipt of the claimant's response to the appeal, and in particular the GP letter dated 23.1.17 which at page 139 refers to balance as a sensory function, the Secretary of State sought advice from Dr Paul Goldsmith, a neurologist at the Newcastle upon Tyne Hospital NHS Foundation Trust. I attach the relevant extract from his advice:

I am happy for my name and qualifications to be shared with the tribunal. My reply has been a little delayed as I wanted to talk to ENT colleagues to ensure my thoughts were in line with their experiences, which they were.

#### **Q1. Sensory system**

I would regard sensory as meaning all information about the external world which is inputted into the brain. Put another way, sensory means afferent inputs, as opposed to efferent outputs (nerves to muscles). Maintaining balance requires the integration of various sensory inputs, including proprioceptive signals from sensory receptors in joint capsules and skin, vision and the vestibular system. The receptor organ of the latter is part of the middle ear, with the inputs going to the brain along with hearing in the vestibulocochlear nerve.

I therefore think that impairment of this is an impairment of a sensory system.

#### **Q2 Expected degree of disability**

A separate question is then whether in this person's case the impairment is sufficient to render them able to perform the functions described below and whether or not this is reversible.

Regarding the second, with Menieres, this typically causes episodes of hearing and balance problems. During an acute episode of any vertigo (whether Menieres or another cause such as severe migraine) one can be incapacitated. In between attacks one can have residual balance disturbance. ENT see Menieres more often than neurologists so would be able to better comment, but in neurology the biggest problem we see is of people who have had some sort of insult to their balance system and then

avoid movements. They then decompensate further and conversely do not provide the stimuli needed for the brain systems to compensate. Another thing to note is that vertigo is often misdiagnosed and one of the commonest causes is migraine associated vertigo (MAV). This is potentially treatable and reversible. Overall I would find it unusual for a patient with Menieres and migraine to be so incapacitated not to be able to cross the road or navigate around familiar surroundings, but I would expect them to have poorer balance, e.g. walking on uneven ground, especially in the dark when one would be removing another balance system, namely vision. My ENT colleagues also have said that in general one would expect reasonable function in someone with even complete loss of a labyrinth. However if they also have poor vision, impaired proprioception because of a neuropathy, then they could have much more significant impairment. I can't comment more specifically on this case without seeing and examining the lady.

6. In the light of that advice, the Secretary of State wished to withdraw the appeal. The findings of the First-tier Tribunal are also accepted.

7. The Secretary of State has no objection to the UT Judge's decision being placed on the UT website."

7. In the light of what the Secretary of State has said in his response set out above, I consent to his appeal to the Upper Tribunal being withdrawn. The effect of this is that the First-tier Tribunal's decision will stand and the claimant will have been entitled to employment and support allowance with the work-related activity component from and including 29 February 2016.
8. This decision is to be placed on the UT(AAC)'s website because the basis of the Secretary of State's concession might be of use in other, similar cases.

**Signed (on the original) Stewart Wright  
Judge of the Upper Tribunal**

**Dated 22<sup>nd</sup> August 2017**