

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

As the decision of the First-tier Tribunal (made on 7 April 2017 at Teesside under reference SC226/16/00460) 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 capability for work on and from 11 August 2016 in accordance with my analysis in paragraphs 10 to 16.
- 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*.

**REASONS FOR DECISION**

**A. The issue**

1. This appeal concerns descriptor (c) of Activity 5 in Schedule 2 to the Employment and Support Allowance Regulations 2008 (SI No 794). Activity 5 is *manual dexterity* and descriptor (c), which carries 9 points, applies if the claimant *Cannot use a pen or pencil to make a meaningful mark with either hand*.

**B. The Secretary of State's assessment of capability for work**

2. The claimant was receiving an employment and support allowance, but this was subject to reassessment in 2016.
3. The claimant completed a questionnaire. She explained that she had weakness and numbness to the left wrist and thumb following an accident at work. She also had nerve damage and disfiguration to her right hand as a result of an amputation following an accident at home. She had no grip in her right hand.

4. She was then interviewed and examined by a healthcare professional. On examination, he found that the left hand had normal grip between thumb and index finger; fist grip was also normal. He found that the right hand had normal grip between thumb and index finger, but the hand was fixed in a claw like state. The claimant had normal touch sensation in both left and right upper limbs. Not surprisingly, he found that the claimant had no disability relevant to activity 5.

5. The Secretary of State accepted the healthcare professional's opinions and terminated the award of employment and support allowance on supersession with effect from 11 August 2016.

### **C. The appeal to the First-tier Tribunal**

6. The claimant appealed successfully to the First-tier Tribunal. It found that she satisfied descriptors 4(b) and 5(c), each of which carried 9 points. The presiding judge provided the tribunal's written reasons, but they contained little to justify the decision. The judge recorded that the claimant has sustained two hand injuries, leaving her with limited use of both arms and hands, particularly by reason of pain and reduced strength. A different judge gave the Secretary of State permission to appeal to the Upper Tribunal, asking: 'Should the Tribunal have explained what it considered to be a meaningful mark and then explained why the Appellant could not perform that activity?'

### **D. The appeal to the Upper Tribunal**

7. I directed the claimant to respond to the appeal. In view of her response, I did not invite the Secretary of State to reply.

8. It is sometimes possible to understand why a tribunal made the decision it did by looking at the evidence. In this case, it is not. The presiding judge recorded two and a half pages of evidence about the claimant's hands and the difficulties she had with them. That evidence was inconsistent with the healthcare professional's findings on examination. The tribunal needed to assess the evidence as a whole. I assume it did so. What it should then have done is to explain the results of that assessment. By results, I mean two things. First, the reasons should contain a statement of how the tribunal reconciled the apparent conflicts in the evidence or preferred some pieces of evidence to others. Second, the reasons should have recorded the facts it found in sufficient detail to show that the conditions for activity 5(c) were satisfied. The reasons failed to do either. There is no indication of whether the tribunal was able to reconcile the claimant's evidence with the findings of the healthcare professional or, if not, which evidence it preferred. Nor is there any indication with sufficient particularity of how the claimant's disabilities satisfied the terms of activity 5(c).

9. The claimant has asked for an oral hearing. I refuse that request. The Upper Tribunal has a discretion whether or not to hold a hearing: rule 34(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698). The test I have to apply is whether 'fairness requires such a hearing in the light of the facts of the case and the importance of what is at stake': *R (Osborn) v Parole Board*

[2014] AC 1115 at [2(i)]. I am required to have regard to the parties' views: rule 34(2). I do not consider that a hearing would assist me or benefit the claimant at this stage. It is clear, as I have explained, that the tribunal's reasons are inadequate and that its decision must be set aside. The directions that I need to give to the First-tier Tribunal for the rehearing are also straightforward. What matters are the findings of fact, which are for the First-tier Tribunal, which will have the benefit of the knowledge and experience of the medical member of the panel.

### **E. Activity 5(c)**

10. It may assist the First-tier Tribunal at the rehearing if I give some guidance on the scope of this descriptor.

11. The **Training & Development - Revised WCA Handbook**, in the version dated 9 February 2015 version, says:

#### **Scope**

This activity relates to hand and wrist function. It is intended to reflect the level of ability to manipulate objects that a person would need in order to carry out work-related tasks. Ability to use a pen or pencil is intended to reflect the ability to use a pen or pencil in order to make a purposeful mark such as a cross or a tick. It does not reflect a person's level of literacy.

That, of course, is guidance, not law, and it is not binding on the First-tier Tribunal. However, following the approach I take to the scope of the descriptor produces the same result as that set out in the **WCA Handbook**.

12. In *SM v Secretary of State for Work and Pensions* [2015] UKUT 617 (AAC), Upper Tribunal Judge Ward said this – I have corrected an obvious typo:

7. It follows that I have received only brief submissions from the parties about descriptor 5 (c). The tribunal found as fact that the claimant could write his signature. It certainly is an issue before me (I am not clear whether it was before the First-tier Tribunal) whether he can do so with reasonable regularity but that is something for the tribunal to which this case is remitted to explore. The claimant's representative draws attention to various definitions of 'meaningful'. In my view descriptor 5(c) is not concerned with marks that are 'meaningful' in the sense of 'having great meaning, eloquent, expressive' (per Collins dictionary). That is a sense which might be appropriate when 'meaningful' is applied to, for instance, glances, but is not a natural sense when applied to something such as rudimentary as a mark with a pen or pencil. Rather, I consider that it in this context means 'having meaning' as opposed to 'not having meaning'. Further than that I prefer not to go in this case.

I agree.

13. The key to understanding and applying the employment and support allowance activities and their descriptors is to identify the function that they are

**SECRETARY OF STATE FOR WORK AND PENSIONS v LH [2017] UKUT 475 (AAC)**  
**UPPER TRIBUNAL CASE NO: CE/1982/2017**

testing. In the case of activity 5, it is manual dexterity. In other words, it is the claimant's ability to use their fingers, hands and (to some extent, at least) wrists. In the case of descriptor (c), it is a measure of the claimant's ability to hold and control a pen or pencil. It is in Part 1 of Schedule 2, so it is limited to physical disabilities arising from *a specific bodily disease or disablement* (regulation 19(5)(a)).

14. The mark has to be meaningful, so it must be capable of conveying some meaning and, inevitably, be a mark that is directed in the sense of the claimant having a meaning in mind. But that does not make the descriptor a test of intellectual capacity, which is the exclusive province of Part 2 of the Schedule (regulation 19(5)(b)). The level of the claimant's literacy is not in issue. This is a test of physical function, whereas literacy is a mental matter. And the test is limited to the claimant's fingers, hands and wrists, which are not related to literacy.

15. I agree with Judge Ward in *SM* that descriptor 5(c) is not concerned with the content of what is written. The only issue is whether it is meaningful. It has to be capable of conveying meaning. Random doodling or scribbling is not sufficient. It is not, though, necessary to convey any particular meaning. None is specified, so any meaning will do. It might be in the form of words, like a person's name or signature. Or it might be in the form of some symbol, such as a tick that could indicate agreement on a form or a cross that could indicate a vote at an election.

**Signed on original  
on 05 December 2017**

**Edward Jacobs  
Upper Tribunal Judge**