CE/1134/2019

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

1. **This appeal by the claimant, brought with my permission given on 31st May 2019, succeeds**. In accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal sitting in Stoke and made on 2nd November 2018 under reference SC306/18/00185. I refer the matter to a completely differently constituted panel in the Social Entitlement Chamber of the First-tier Tribunal (including no judge or member who has previously considered this matter) for a fresh hearing and decision in accordance with the directions given below.

Directions

2. The claimant should consider requesting the tribunal to hold an oral hearing and in default of such request consideration should in any event be given as to whether an oral hearing should be held. The parties should regard themselves as being on notice to send to the clerk to the tribunal as soon as is practicable any further relevant written medical or other evidence. The fact that the appeal has succeeded at this stage is not to be taken as any indication as to what the tribunal might decide in due course. The new panel will have to consider afresh all of the evidence and make its own findings of fact, independently of the findings made by the previous panel.

The Relevant Law

3. My decision is based solely on procedural matters, but I summarise the legal background in order to place it in context. Employment and support allowance ("ESA") was introduced by section 1(1) of the Welfare Reform Act 2007. Subject to the satisfaction of other conditions which are not relevant for the purposes of my decision, section 1(2)(a) of the Act provides that a claimant is entitled to ESA if he satisfies the "basic conditions". The basic condition that is disputed in this case is defined in section 1(3)(a) as being that the claimant "has limited capability for work".

4. Section 1(4) provides that:

> 1(4) … a person has limited capability for work if –
> (a) his capability for work is limited by his physical or mental condition, and
> (b) the limitation is such that it is not reasonable to require him to work.

5. Section 8 of the Act provides that whether a person's capability for work is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to work shall be determined in accordance with regulations which provide for an assessment by reference to the extent to which a person who has some specific disease or bodily or mental disablement is capable or incapable of performing such activities as may be prescribed.

6. The relevant regulations are the Employment and Support Allowance Regulations 2008. Regulation 19 and Schedule 2 provide for the assessment. Regulation 19(2) describes the assessment as an assessment of the extent to which a claimant "who has some specific disease or bodily or mental disablement is capable or incapable of performing the prescribed activities". Regulation 19(3) provides that a claimant has limited capability for work if he obtains a score of at least 15 points in respect of descriptors listed in Schedule 2.

Background and Procedure

7. The claimant is a man who was born on 17th November 1969. He had been entitled to ESA until 15th May 2017 on the basis that he was suffering from anxiety and depression, asthma and a knee problem. Entitlement was terminated from 16th May 2017 by a decision made by the Secretary of State on 30th May 2017 because the claimant had failed to attend a medical assessment on 15th May 2017. I am not aware that the claimant appealed against that decision, but it seems that on 8th August 2017 he made a new claim as from 16th May 2017.

8. On 9th February 2018 the claimant was examined on behalf of the Secretary of State by a registered nurse. Having received the nurse's report the Secretary of State decided on 14th February 2018 that only 6 points could be allocated (in respect of coping with social situations). As this was below the threshold score the claimant did not have limited capability for work and was not entitled to ESA. On 25th April 2018 the claimant appealed to the First-tier Tribunal against the decision of the Secretary of State. The First-tier Tribunal considered the matter on 27th June 2018. The panel consisted of Judge W and Dr R. Neither party attended. The decision of the First-tier Tribunal was:

> "This appeal is adjourned for paper determination on the first available date after compliance with the directions set out below or in default after 6 weeks.
>
> Members of this tribunal are not excluded from future involvement in the appeal.
>
> The appeal was adjourned today because the appeal was listed as a paper case and the Tribunal considered it to be in the interests of justice to give the Appellant an opportunity to attend to give evidence given his complex medical history. The opportunity was also taken to obtain medical records".

9. The clerk was given directions to obtain certain relevant medical evidence. I make no criticism of the decision to adjourn the appeal, nor of the view expressed that the same panel members (which is undoubtedly what was meant by "members of this tribunal") could continue to be involved in the appeal. It was premature to direct a "paper determination" of an appeal in which the tribunal considered the claimant should attend a hearing to give evidence but in the event this made no difference.

10. Medical records were obtained and the matter came before the First-tier Tribunal again on 2nd November 2018. This time the panel consisted of Judge W and Dr I. The tribunal noted that neither party had requested an oral hearing, but considered that it had adequate evidence to make a decision on the basis of the papers, which it proceeded to do. It confirmed the decision made by the Secretary of State. On 27th February 2019 the claimant asked the First-tier Tribunal for permission to appeal to the Upper Tribunal against that decision and on 17th March 2019 a judge of the First-tier Tribunal refused the claimant such permission, notification of this being sent to the parties on 7th April 2019. The claimant now appeals by my permission given on 31st May 2019. The Secretary of State opposes the appeal and supports the decision of the First-tier Tribunal. Neither party has requested an oral hearing of the appeal.

Conclusions

11. In giving permission I stated:

> "It appears that the same judge sat on two occasions for a substantive consideration of this appeal, but on each occasion with a different medical member with whom substantive consideration was given. This appears to be a breach of the rules of natural justice and fair procedure. Citing this reason is not intended to prevent the claimant from also pursuing other grounds of appeal".

12. The Secretary of State has argued that the hearing on 2nd November 2018 was a "complete rehearing" and therefore there was no unfairness. That misses the point. Where a judge has discussed the facts with one panel member who is not on the final panel (as had clearly happened on 27th June 2018) but actually makes a decision after discussion with a different panel member (as happened on 2nd November 2018) then, in the absence of clear evidence to the contrary, it cannot be excluded from possibility that the judge remains influenced by views expressed by the member who did not sit on the final panel, and this is a breach of fair procedure. It would have been different had no discussion of the facts taken place at the first hearing.

13. For the above reasons this appeal by the claimant succeeds.

H. Levenson
Judge of the Upper Tribunal
30th August 2019