



DECISION

of

THE HON. LORD FAIRLEY

in the appeal of

Social Security Scotland

Appellant

- against -

AM

Respondent

FTS Case Reference: FTS/SSC/AE/23/00515

Representation:

For the Appellant: James Halley, solicitor; Anderson Strathern LLP

For the Respondent: No appearance

Decision

The appeal is refused.

Reasons

History of the case



1. On 14 October 2022 the Respondent submitted an application for Adult Disability Payment (“ADP”) under The Disability Assistance for Working Age People (Scotland) Regulations 2022 (“the 2022 Regulations”). There are potentially two components to an award of ADP, known respectively as the daily living and the mobility components. Whether a claimant is entitled to either or both components and, if so, at what rate depends on the number of points they score on activities (known as “descriptors”) set out in schedule 1 to the 2022 Regulations. ADP may be awarded at standard or enhanced rates. The minimum number of points for an award of either the daily living or mobility component at the standard rate is 8. A score of 12 points or more on either component gives rise to an entitlement at the enhanced rate.
2. By Notice of Determination dated 16 May 2023 the Appellant made no award of ADP to the Respondent. The Respondent applied for redetermination of that decision. A Notice of Redetermination dated 17 July 2023 upheld the decision of 16 May 2023.
3. The Respondent then appealed to the First Tier Tribunal (“FTS”). Following a hearing on 16 February 2024, the FTS set aside the redetermination decision of 17 July 2023 and substituted its own decision that the Respondent was entitled to ADS with a daily living component at the standard rate, and a mobility component at the enhanced rate.
4. The points awarded by the FTS for the daily living component were as follows:

Descriptor 1(b) – “Needs to use an aid or appliance to be able to either prepare or cook a simple meal”	2 points
Descriptor 4(b) – “Needs to use an aid or appliance to be able to wash or bathe”	2 points
Descriptor 6(b) – “Needs to use an aid or appliance to be able to dress or undress”	2 points
Descriptor 8(c) – “Needs prompting to be able to read or understand complex written information”	2 points
Descriptor 10(b) – “Needs prompting or assistance to be able to make complex budgeting decisions”	<u>2 points</u>
Total	10 points

5. The points awarded by the FTS for the mobility component were as follows:

Descriptor 1(d) – “Cannot follow the route of an unfamiliar



journey without another person, assistance dog or orientation aid.” 10 points

Descriptor 2(b) – “Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided.” 4 points

Total 14 points

6. The Appellant does not seek to challenge the points awarded under descriptors 1(b), 4(b) or 6(b) of the daily living component or under descriptor 2(b) of the mobility component. It submits, however that the FTS erred in law in its application of descriptors 8(c) and 10(b) of the daily living component and descriptor 1(d) of the mobility component.

The FTS’s findings in fact and reasons

7. The FTS found that the Respondent has a number of physical conditions including ischaemic heart disease, osteoarthritis of the ankles, gall stones and chronic pancreatitis (para. 7). In addition, it found that he has alcohol addiction issues. None of those conditions appears to have any bearing upon descriptors 8(c) and 10(b) of the daily living component or descriptor 1(d) of the mobility component.

8. The FTS also found that the Respondent attended a special needs secondary school and “struggles with reading and writing” (para. 11).

9. In relation to daily living descriptor 8(c), the FTS stated (para. 27):

“...[T]he appellant gave evidence that he attended a special needs school. The appellant gave evidence that he struggled with reading and writing. The appellant does not have a diagnosed learning or cognitive disability...The Tribunal decided that there was insufficient information that the appellant could not understand basic information more than 50 percent of the time. He gave evidence that he could, for example, manage simple information in letters, but struggled with letters from the hospital or his support worker, requiring assistance to understand them...However the Tribunal decided that the appellant required assistance for complex information more than 50 percent of the time. The Tribunal accordingly awarded descriptor 8(c).”

10. In relation to daily living descriptor 10(b), the FTS stated (para 29):

“[T]he appellant gave evidence that he can manage to carry out basic transactions in shops, but that he is unable to read and write...The Tribunal decided that, taking the evidence as a whole, the appellant was able to manage simple budgeting decisions unaided the majority of the time, but would struggle with complex decisions. Accordingly the Tribunal awarded descriptor 10(b).”



11. Finally, in relation to mobility descriptor 1(d), the FTS stated (para 30):

“[T]he tribunal heard evidence from the appellant that his girlfriend would accompany him to unfamiliar places and to the supermarket (a large Asda) on the bus, but he could go to the local shop himself. He would struggle with timetables due to difficulties with reading. The Tribunal decided that, from the evidence heard in particular during the Tribunal, the appellant could carry out journeys without prompting. He was able to, for example, visit the local shop. He did not therefore require prompting to carry out a journey, and was able to carry out familiar journeys. From the evidence the Tribunal decided that the appellant was unable to follow the route of an unfamiliar journey without someone with him due to difficulties with reading and writing. They awarded mobility descriptor 1(d).”

Summary of the grounds of appeal

12. Under reference to *SSWP v. IV (PIP)* [2016] UKUT 0420, the Appellant submitted that the FTS erred in failing to recognise that before any points could be awarded under daily living descriptors 8(c) or 10(b) or mobility descriptor 1(d) as a result of difficulties which the Respondent has with reading and / or writing, such difficulties had to be linked to a physical or mental condition (Regulations 5 and 6 of the 2022 Regulations and *SSWP v. IV (PIP)*).
13. At para. 7 of its findings in fact, the FTS recorded the Respondent’s reported physical conditions and his issue with alcohol addiction. None of those was said to affect the Respondent’s ability to read. Further, at para 27, the FTS found that the Respondent does not have a diagnosed learning or cognitive disability.
14. The FTS did not, therefore, identify any physical or mental condition which would account for the difficulties the Respondent has with reading. It was accordingly in error in awarding points under any of the challenged descriptors on account of his difficulties with reading.

Leave to appeal

15. Leave to appeal was granted by the FTS on 28 March 2024. In granting leave, the Convenor of the FTS expressed disagreement with the Appellant’s submission that the Respondent’s difficulties with reading and writing had to be linked to a physical or mental condition before points could be awarded.



Regulations 5 and 6 of the 2022 Regulations

16. So far as material to this appeal, Regulations 5 and 6 of the 2022 Regulations state *inter alia*

“Daily Living Component

5.—

...(2) An individual is entitled to the daily living component at the standard rate if—

(a) the individual’s ability to carry out daily living activities is limited by the individual’s physical or mental condition or conditions...

(3) An individual is entitled to the daily living component at the enhanced rate if—

(a) the individual’s ability to carry out daily living activities is severely limited by the individual’s physical or mental condition or conditions...

Mobility Component

6.—

...(2) An individual is entitled to the mobility component at the standard rate if—

(a) the individual’s ability to carry out mobility activities is limited by the individual’s physical or mental condition or conditions...

(3) An individual is entitled to the mobility component at the enhanced rate if—

(a) the individual’s ability to carry out mobility activities is severely limited by the individual’s physical or mental condition or conditions...”

Issues in this appeal

17. The three issues which arise in this appeal are:

- 1) What is meant by the expression “mental condition” in Regulations 5 and 6 of the 2022 Regulations?;
- 2) Was there a basis for the FTS to conclude that the Respondent had such a condition?; and
- 3) Did the FTS properly address the issue of causation?

The meaning of “mental condition”

18. In *SSWP v. IV*, the Upper Tribunal considered the expression “mental condition” under the PIP Regulations in the context of difficulties with reading. It noted (para. 20):



“Some people cannot read because they have a mental condition that limits their ability to read or has prevented them learning to do so. Others cannot read because they have never learned... This means that entitlement may take account of illiteracy for a person who has limited ability to read or who could not learn to read, but not for a person who simply has not learned.”

19. Although the quoted passage is useful as a starting point, it does not provide a complete answer to the question of what may constitute a “mental condition”. In particular, it does not resolve the issue of whether a mental condition requires to consist of an illness or other adverse mental health condition (see *KP v. SSWP (PIP)* [2017] UKUT 0030 at para 16; and *cf SSWP v. LB (PIP)* [2016] UKUT 0530 at para 47).

20. That issue was, however, addressed in *TK v. SSWP* [2020] UKUT 22 (AAC). Under reference to section 78 of the Welfare Reform Act, 2012, Upper Tribunal Judge K Markus KC noted that:

“The phrase “limited by the person’s physical or mental condition” means that there must be a physical or mental cause of their limitation. A person must lack the physical or mental power or capability to perform the activity in question. A person will not qualify if the limitation on their ability to carry out an activity is due to their belief or habits (see paragraph 39 of R(DLA) 3/06), choice or other circumstances such as their living arrangements or financial position... Although in practice a claimant’s limitation will very often be a consequence of what might be described as a “health condition”, it is not appropriate to add words to the statutory language. The unqualified use of the word condition reflects the aim of the legislation to focus on a functional approach to entitlement.”

21. More recently, in *PW v. SSWP* [2023] ULUT 121 (AAC), Upper Tribunal Judge Jacobs noted (para 10) that it is not necessary for a claimant to have a diagnosis of a particular condition in order to qualify for PIP, albeit that if a diagnosis exists it may be something to which regard can be had.

22. These decisions under the PIP Regulations provide useful guidance as to how the 2022 Regulations ought to be interpreted. Before points can be awarded under the Regulations 5 and 6 of the 2022 Regulations and the relative schedule 1, there must be an effect on the claimant which falls within the terms of the descriptor in question. There must also be a causal link between that effect and a physical or mental condition experienced by the claimant. The observation to the contrary made by the Convenor of the FTS in her 28 March 2024 decision on the leave application was incorrect.

23. The requirement for there to be “mental condition” for these purposes means no more than there must be a physical or mental cause of the relevant effect. In other words, the claimant must lack the physical or mental power or capability to perform the activity in question. It is



not essential that the absence of power or capability should arise from a clinically recognised illness, disease or other health condition.

Was there a basis for the FTS to conclude that the Respondent had such a condition?

24. On a fair reading of the FTS's reasons, it is tolerably clear that it concluded that the Respondent's issues with reading were due to an absence of ability to learn to read rather than being a matter of choice. That is implicit in the reference by the FTS to the Respondent having attended a special educational needs school and in the evidence referred to at paras 27, 29 and 30 of its reasons. As noted above, such absence of the ability to learn to read is, as a matter of law, capable of constituting a "mental condition" in terms of Regulations 5 and 6. The absence of ability does not have to arise from a clinically recognised illness, disease or other health condition.

Did the FTS properly address the issue of causation?

25. Notwithstanding the unfortunate comment by the Convenor in the leave decision of 28 March 2024, it is clear that the FTS also recognised the need for there to be a causal connection between the established mental condition on the one hand and the particular matters referred to in the descriptors on the other. The FTS plainly concluded that the Respondent's difficulties with reading were causally connected to his mental condition.
26. Once such a causal connection was established, whether or not the effect(s) of the mental condition were sufficient to establish the levels of impairment described in each of the descriptors was primarily an issue of fact for the FTS. Although it is not as clear as it could have been that the FTS took fully into account the statutory definitions of "complex written information" and "complex budgeting decisions" in schedule 1, or that it considered whether the Respondent's difficulties with reading impaired his ability to follow a route rather than merely to read a timetable, those were not points that were raised in this appeal.

Conclusion and disposal

27. For these reasons, the appeal is refused.

Lord Fairley
23 July 2024

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the*

Upper Tribunal for Scotland



Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.