



DECISION OF

THE HON. LORD FAIRLEY

in the appeal of

CP

Appellant

- and -

Social Security Scotland

Respondent

FTS Case reference: FTS/SSC/AE/23/00223

24 January 2025

Decision

1. The first ground of appeal is refused.
2. The second ground of appeal succeeds. The decision of the FTS is set aside only in relation to mobility activity 1 (descriptors 1a to 1f inclusive), and the case is remitted to the same First-Tier Tribunal to determine that aspect of the appellant's claim.

Reasons for decision

Introduction

1. The appellant has asthma, dyslexia, depression and anxiety. She made an application for Adult Disability Payment ("ADP") under the Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2022/54). Her claim having been refused by the respondent, she then appealed to the First-tier Tribunal ("FTS").



2. Following a hearing on 2 October 2023, the FTS issued a decision notice dated 4 October 2023. The FTS found that the appellant was entitled to points only under daily living descriptors 8b and 10b. This resulted in a total award of 4 points which was below the threshold at which any entitlement to benefit arose.
3. The appellant then submitted an application for permission to appeal to the Upper Tribunal. As a result of that application, the FTS issued a further decision notice dated 27 November 2023 expanding upon the reasons for its decision of 4 October 2023. On the face of matters, that was a review of the earlier decision in terms of section 43(2)(a) of the Tribunals Scotland act 2014. Unfortunately, however, the FTS did not deal, at that time with the appellant's application for permission to appeal.
4. On 26 September 2024, almost a year after the original decision notice, the FTS issued a further decision dealing with the application for permission to appeal. For the most part, the decision of 26 September 2024 duplicated the previous decision of 27 November 2023. A final paragraph was added, however, addressing the question of permission to appeal. It stated:

“The Tribunal was satisfied that a combination of the Appellant's physical and mental health problems justified the award of the relevant points as specified in the Tribunal's Decision. However it is inescapable that, given the inadvertent delay in issuing this decision, there has been a question raised as to whether justice has been seen to be done. For that reason I consider that permission to appeal to the Upper Tribunal should be given in the interests of justice.”

5. It seems, therefore, that unqualified permission to appeal on the proposed grounds was given simply because there had been a delay in dealing with the permission application. It is important to note, however, that there was no material delay in issuing the original decisions in 2023, and the issue of delay does not feature as one of the grounds of appeal for which permission was granted. I approach the appeal on the basis. Two grounds are advanced, and I will deal with these in turn.

Ground 1

6. In broad terms, this ground suggests that the FTS made insufficient findings of fact in relation to several of the daily living and mobility descriptors. Some of these descriptors are identified in the grounds of appeal by reference to their numbers in the Schedule to the Regulations, but others are not. The following analysis, therefore, represents my interpretation of the points that the appellant seeks to make.



7. The first point which seems to be made is that the FTS did not fully consider mobility activity 1. The passages of the FTS's findings in fact which potentially touch upon mobility activity 1 – "Planning and following journeys" – are paragraphs 7, 9 and 11.
8. Within those paragraphs, the FTS made the following findings:
 - "7. [The appellant's] mental health issues do not restrict her functioning and are exemplified by evidence including of her ability to drive to familiar places and to engage in her employment at a local Pharmacy...
 9. She was able to walk up to 10 minutes at a time and her physical walking ability was not impacted by her asthma to a degree where an award could be made under mobility descriptor 10 (*sic*)...
 11. She was able to... follow routes to an extent that there could be no award of points for any relevant descriptor"
9. The grounds of appeal suggest, however, that the reasons given by the FTS do not expressly mention the issue of ability to make unfamiliar journeys (mobility descriptor 1d) and do not address the issue of her anxiety and its effect on her ability to leave her house.
10. In relation to the first of these points, the FTS noted in its decision on the permission application that it heard "no evidence" about ability to follow unfamiliar journeys. On the face of matters, therefore, this ground of appeal looks to be an attempt to re-try the case. The appellant alludes, however, to such evidence having been before the FTS, and this is the subject of ground of appeal 2. I will, therefore, return to this issue below.
11. In relation to the second point, it is not clear which mobility descriptor is relied upon. The issue of psychological distress is mentioned only in descriptor 1e – "Cannot undertake any journey because it would cause overwhelming psychological distress to the individual". There is no suggestion in the grounds of appeal that evidence of psychological distress to that degree was led before the FTS. There is, therefore, no merit in this ground. It is an attempt to re-try fact, and permission should not have been granted for it.
12. The grounds also appear to suggest that mobility activity 2 ("moving around") was not properly considered by the FTS. In particular, it is suggested that para. 9 of the findings in fact deals only with the time for which the appellant could walk and not the distance that she could cover within that time. Whilst that is technically correct, there is no suggestion that any evidence was led before the FTS that the appellant was unable to move more than 200 meters either aided or unaided. The finding in paragraph 9 of the FTS's reasons that her physical walking ability was not impacted by her asthma to a degree where an award



could be made in respect of mobility was a sufficient finding to allow it to reach the decision it did on mobility activity 2.

13. Turning to the daily living descriptors, the next point which the grounds of appeal appear to make is that daily living activity 9 – “Engaging socially with other people face to face” – was not properly considered. The relevant findings in fact appear to be found at paragraphs 7, 10 and 11. I have already quoted paragraph 7 above. Paragraph 10 stated:

“Her mental health was compromising her ability to function in life in certain aspects but not so as to impact upon any descriptor for an award other than in daily living 10[b]. She was able to meet strangers or those not within her immediate family and handle situations out with that circle of contacts adequately.”

14. So far as material, paragraph 11 states:

“She was able to deal with and encounter a variety of people and... socialise with others... to an extent that there could be no award of points for any relevant descriptor.”

15. The quoted findings demonstrate that the tribunal adequately considered daily living descriptor 9. Again, this ground of appeal is an attempt to re-try fact. Permission to appeal should not have been granted for it.

16. The appellant also seems to take issue with the FTS’s consideration of daily living activity 1 – “Preparing food”. Again, paragraph of the FTS’s reasons 11 is important:

“She was able to make meals, eat and take nutrition to an extent that there could be no award of points for any relevant descriptor”.

17. Once again, therefore, this part of the appeal is an attempt to re-try fact for which permission should not have been given.

18. Finally in this ground 1, the appellant challenges the FTS’s consideration of daily living activity 3 – “Managing therapy or monitoring a health condition”. It is suggested that the FTS failed properly to consider descriptor 3(b)(iii) – “Needs...supervision, prompting or assistance to be able to monitor a health condition.” The appellant notes that the respondent had previously awarded 2 points for this descriptor.

19. Within its original reasons, the FTS noted that the appellant worked in a pharmacy. In its decision of 26 September 2024, it noted that it found the appellant to be incredible in her suggestions that she could not manage her own medication or consult with her doctor. Whilst these findings on credibility should have been more clearly spelled out in the



original decision notice, the appellant can now be in no doubt as to why the FTS did not consider that points should be awarded for daily living activity 3, and there is therefore no merit in this ground. In any event, it is not apparent that any evidence was led before the FTS as to what level of supervision or prompting the appellant claimed she required. That would have been necessary before any points could have been awarded for this activity.

Ground 2

20. The appellant submits that the FTS ignored relevant evidence about the appellant's ability to follow the route of an unfamiliar journey without assistance (mobility activity 1). Having listened to the recording of the hearing before the FTS, the appellant's representative submits that the appellant was asked how often she went to unfamiliar places. Her response was that she didn't and required her daughter to accompany her. In its written submission, the respondent does not dispute that such evidence was led.
21. Arguably, however, that may be at variance with the FTS's account (as noted above) that it "did not hear evidence on unfamiliar journeys". This is not, therefore, a situation where the FTS has made a finding on the credibility and reliability of the appellant's evidence. Rather, it appears to have overlooked entirely the fact that such evidence was given.
22. In these circumstances, there is merit in this second ground of appeal, which I will allow and remit the case to the same FTS to consider the applicability of mobility activity 1 (descriptors 1a to 1f) to the appellant's case.
23. Since the only point of any merit in ground 1 is duplicated in ground 2, I will refuse ground 1 in its entirety.

The Hon. Lord Fairley

Member of the Upper Tribunal for Scotland

*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 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.*