IN THE UPPER TRIBUNAL **Case No.** CE/3637/2016
ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Rowland

Decision: The claimant's appeal is allowed. The decision of the First-tier Tribunal dated 27 September 2016 is set aside and the case is remitted to a differently-constituted panel of the First-tier Tribunal to be re-decided.

REASONS FOR DECISION

1. This is an appeal, brought with my permission, against a decision of the First-tier Tribunal dated 27 September 2016, whereby it dismissed his appeal against a decision of the Secretary of State dated 1 April 2016 superseding an award of employment and support allowance and deciding that the claimant was not entitled to employment and support allowance from 1 April 2016. The Secretary of State had not found any descriptors in either of Schedules 2 or 3 of the Employment and Support Allowance Regulations 2008 (SI 2008/794), as amended, to be satisfied. The First-tier Tribunal awarded 9 points under descriptor 1(c) of Schedule 2, but that was not enough to affect the outcome.

2. I gave permission to appeal on the ground that it was arguable that the First-tier Tribunal had not given adequate reasons for its decision not to award points under Activity 9 of Schedule 2, given the arguments expressly made to it by the claimant's representative at doc 115-116. The Secretary of State concedes that the First-tier Tribunal's decision is wrong in law on that ground, emphasising (as the claimant's representative has also done) that the standard of reasoning needs to be considered against the background of the claimant's oral evidence to the First-tier Tribunal as well as the written evidence and submissions.

3. Activity 9 of Schedule 2 is set out as follows –

Activity	*Descriptors*	*Points*
9. Absence or loss of control whilst conscious leading to extensive evacuation of the bowel and/or bladder, other than enuresis (bed-wetting), despite the wearing or use of any aids or adaptations which are normally, or could reasonably be, worn or used.	9 (a) At least once a month experiences: (i) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder; or (ii) substantial leakage of the contents of a collecting device sufficient to require cleaning and a change in clothing.	15
	(b) The majority of the time is at risk of loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder, sufficient to require cleaning and a change in clothing, if not able to reach a toilet quickly.	6

(c) Neither of the above applies. 0

Descriptor 8 of Schedule 3 is in the same terms as descriptor 9(a) of Schedule 2, save that "week" is substituted for "month".

4. The First-tier Tribunal addressed these descriptors at some length in paragraphs 12 to 15 of its statement of reasons, under the heading "incontinence". It appears that it was concerned about the different ways in which the claimant had put his case in writing, about the lack of medical support for the claimant's case – his general practitioner having referred to urinary frequency in a letter, rather than bladder incontinence, and not having referred to either condition on form ESA113 and the claimant not using pads or having been referred to an incontinence clinic or specialist – and about the claimant's oral evidence in which he said that his condition improved, although in its statement of reasons it continued –

> "14. … he maintained that he suffered an accident at least once per week, stating that once he started to leak, he had no control, but that sometimes he could get quickly to the toilet and finish. This evidence, again, described urgency (and also frequency) but not, the Tribunal found, incontinence. In any event, the Appellant's description of his condition did not, at its height, amount to a difficulty for most of the time."
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> 15. The Tribunal, having regard to the entirety of the evidence, decided, on the balance of probabilities, that the Appellant did not have any functional restriction in respect of his prescribed activity, within the terms of the Regulations, that attracted a score of any points."

5. Paragraph 15 states a conclusion for which reasons were required. Of course, reasons can sometimes be inferred but, even reading the whole of paragraphs 12 to 15 together, I am left in doubt as to why the First-tier Tribunal reached the conclusion it did in this case. It did not make a finding to the effect that it did not accept the claimant's evidence and the last sentence of paragraph 14 suggests that it considered that it did not need to do so. Nor did it make a finding that the claimant could have avoided the need to clean himself and change his clothing if he had worn pads, which would have required it not only to find that pads would have been effective but also to explain why it rejected his case that it was not reasonable to expect him to wear them because his piles meant that wearing pads was painful. A claimant's judgment as to whether to wear pads that cause discomfort or worse may, of course, be influenced by his or her perception of their likely effectiveness.

6. Most importantly, given the last sentence of paragraph 14, it has not explained why, if the claimant's evidence was accepted, he did not satisfy either of the point-scoring descriptors. It is possible that it placed too much weight on the distinction between urgency and incontinence. The word "continence", which at one time featured in the Schedules, no longer does so: the question is simply whether the claimant loses control, or is at risk of doing so, to the extent that he requires, or would require, cleaning and a change of clothing. Moreover, the words "evacuation"

of the bowel and "voiding" of the bladder in descriptor 9(a)(i) need to be read in the light of descriptor 9(a)(ii) and I agree with the Secretary of State that the revised WCA Handbook (5 July 2016) accurately describes their effect –

> "The descriptors relate to a substantial leakage of urine or faces – such that there would be a requirement for the person to have a wash and change their clothing."

7. Descriptor 9(b) is satisfied when the claimant has only rare occasions of such a substantial leakage but is, for the majority of the time, at risk of having one unless able to reach a toilet quickly. In this case, 6 points awarded under that descriptor would have given the claimant the 15 points necessary for him to be found to have limited capability for work. It is possible that the First-tier Tribunal's considered the difference between urgency and incontinence to be significant because it reasoned that, if the claimant suffered only from urgency, there would be a substantial period of time after he had completely voided his bladder before he was at risk of a further voiding so that the descriptor was not satisfied for "[t]he majority of the time" but, if that is so, it is not very clear and, in any event, finding that descriptor 9(b) was not satisfied did not make it unnecessary to consider descriptor 9(a).

8. For these reasons, I agree with both parties that the First-tier Tribunal's decision is wrong in law. I also accept both parties' submission that the case should be remitted to the First-tier Tribunal.

Mark Rowland
5 October 2017