



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

Before Upper Tribunal Judge Sutherland Williams

Decision

1. **This appeal by the claimant succeeds.** Permission to appeal having been given by Upper Tribunal Judge Levenson on 17 November 2020, and 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 Port Talbot on 8 November 2019 (under reference SC188/19/03037) and remit this matter to a differently constituted panel in the Social Entitlement Chamber for reconsideration in accordance with the Directions given below.
2. Neither party has requested an oral hearing. Having reviewed the papers, I am satisfied that this matter can be dealt with on the papers alone. The submissions from the parties are clear and further oral submissions are unlikely to assist.
3. The Secretary of State does not support this appeal. The respondent suggests that the First-tier Tribunal ('the FTT') has provided a sufficiently clear explanation for why it accepted the medical adviser's evidence and what evidence it relied upon in coming to its decision.
4. For the reasons set out below, I have concluded that the FTT has erred in law.

Background

5. This appeal concerns a decision made on 22 July 2019 relating to industrial injuries disablement benefit ('IIDB'). The appellant's claim form states that he was working as a kitchen cleaner when on 2 June 2017, he sat on a chair, and it broke into 3 pieces. He says he fell backwards and his back slammed onto the floor below him. He initially reported lower back pain, redness, sprains, and sore muscles.
6. He was given a provisional award of IIDB on 12 September 2017 at 20%, which was increased to 25% on 29 January 2018, and further extended on 31 July 2018. On 25 June 2019, he was examined by a medical adviser on behalf of the respondent, who was of the opinion that from 1 August 2019, the

appellant had no remaining loss of faculty from the index accident, leading to the decision to end his entitlement to IIDB.

7. On 11 September 2019, the appellant completed a notice of appeal, suggesting he wanted his appeal decided on the papers. The administration in HM Courts and Tribunal Service ('HMCTS') treated this as a request for the case to be determined on the papers. (This is an important aspect to the appeal. I note that the appellant had a representative, the Citizens Advice Bureau, Cardiff and Vale ('CAB'), and that the appellant also, in terms of any hearing, identified that he was 'available to attend the hearing at any time', he had special needs that would require him to 'bring someone for support', and that he would also need an interpreter or signer to assist at the hearing. He also asked for 14 days' notice of any hearing.)
8. It was against this background that the appeal was listed as a paper determination before the FTT on 8 November 2019. The appeal was refused.
9. At the time of requesting a statement of reasons, the CAB asked for the decision to be set aside on the basis that there was no notification of the hearing to the representative in order for a submission to be completed 'arguing the points raised in the appeal'. It appears that the CAB was taken by surprise when the outcome decision arrived.
10. In response to the set-aside request, the judge indicated that the decision would not be set aside because 'the reason the appellant was not sent notification of the hearing was that he did not elect to have an oral hearing'. (I observe that it is not clear whether there was any scrutiny of the notice of appeal form at that time).
11. A statement of reasons was subsequently prepared on 24 January 2020.

Why I am allowing this appeal

12. The CAB submits that the tribunal should have adjourned to hear oral evidence from the appellant because of the nature of the case. The respondent does not address this point directly in the submission before me.
13. It is apparent from the decision notice and the statement of reasons that the tribunal was of the view that the appellant had elected for his case to be decided as a paper determination, and therefore to proceed was consistent with rules 2 and 27 (1) of the Tribunal Procedure (Social Entitlement Chamber) Rules.
14. Rule 27 (1) provides as follows:

Decision with or without a hearing

27.—(1) Subject to the following paragraphs, the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—

- (a) each party has consented to, or has not objected to, the matter being decided without a hearing; and
 - (b) the Tribunal considers that it is able to decide the matter without a hearing.
15. My concern is as follows. An appellant is entitled to attend the hearing of their appeal. If there is some ambiguity over the appellant's request in this regard, it appears to me to be incumbent on the tribunal to address it, if only to explain why they decided to proceed.
16. Section 6 is a tick box, either asking for an oral hearing or an 'on the papers' decision; and section 7, which the appellant in the instant matter completed, states 'You only need to answer these questions if you told us in section 6 that you wanted to attend a hearing. If you have asked for your appeal to be decided on the papers, please skip this section and go straight to section 8'.
17. It is significant therefore that the appellant then proceeded to complete the four questions in section 7, adding that he would like to bring someone for support, notwithstanding his election of a paper determination under section 6.
18. This does not necessarily mean that the tribunal's decision to proceed was incorrect. However, the FTT should have addressed the point, if only to dismiss it.
19. The failure to do so potentially results in a loss of opportunity. I bear in mind that once submitted, the appellant, and possibly his representative, may not have registered any error and, further, that the CAB anticipated an oral hearing, and indeed wished to make submissions.
20. The mere assertion that rule 27(1) has been considered is, in a case where there is ambiguity, insufficient. The tribunal must also apply its mind to the possibility of an error in the completion of the form.
21. In determining whether to proceed under rule 27(1), it is not merely enough to consider whether there is sufficient evidence to make a decision. The tribunal must also consider more generally whether it is in the interests of justice to proceed with a paper determination, particularly in circumstances where it is unclear if the appellant was consenting to have his case determined on the papers alone. The question is whether an oral hearing is required in order to ensure a fair hearing - the purpose being to assist with decision-making and to allow participation.
22. I have therefore concluded that this matter must be remitted to the FTT to begin again. There has been an error of law. I am not satisfied that the tribunal's decision to proceed with a paper determination is properly or adequately explained.

- 23. The new panel will make its own findings in relation to this appeal. They will consider all aspects of the case afresh.**
- 24. The fact that the appeal has succeeded at this stage is not to be taken as any indication about what the tribunal might decide in due course.**

AND I DIRECT:

1. The decision of the First-tier Tribunal sitting in Port Talbot on 8 November 2019 under reference SC188/19/03037 is set aside.
2. The case will be an oral hearing listed before a differently constituted panel.
3. Within 28 days of the issue of this decision, the appellant/his representative shall send to the relevant HM Courts and Tribunals Service office any further submission, medical or other evidence upon which he or his representative seek to rely. The appellant or his representative must also give a clear indication of whether an oral hearing is required and, if so, who will be attending.
4. These directions may be supplemented or changed by a District Tribunal Judge giving listing and case management directions.

M. SUTHERLAND WILLIAMS
Judge of the Upper Tribunal

Signed on the original on 16 June 2021