IN THE UPPER TRIBUNAL **Case No UA-2022-000388-PIP**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 90 (AAC)**

Appellant: JS
Respondent: SSWP

DECISION OF THE UPPER TRIBUNAL

E FITZPATRICK

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal:	First-tier Tribunal (Social Security and Child Support)
Tribunal Case No:	SC024/19/04626
Tribunal Venue:	Reading
Decision date:	24.8.21

IN THE UPPER TRIBUNAL Upper Tribunal Case No. UA-2022-000388-PIP
ADMINISTRATIVE APPEALS CHAMBER

Before: Ms E Fitzpatrick, Judge of the Upper Tribunal

Decision: The decision of the First-tier Tribunal (SC024/19/04626) of 24th August 2021 involved the making of an error on a point of law.

Under section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I **set aside** the Tribunal's decision and **remit the appeal for re-hearing** before the First-tier Tribunal. Directions for the re-hearing are at the end of the reasons for the decision.

REASONS FOR DECISION

Background

1. The main issue in this appeal concerns the decision of the FTT to exclude evidence post-dating the date of decision under appeal (15/7/19) from its assessment of risk at the time of the decision (paragraph 25 of the written reasons).

2. The appellant suffers from a number of conditions including epilepsy with her first seizure occurring in 2002. She suffered further convulsive seizures in 2016 and 2017. Post 2017 she managed her condition with diet and medication and reapplied for her driving licence which was granted in June 2018. On 6th November 2020 she suffered a further tonic-clonic seizure as a result of which she appears to have fallen striking her head. She suffered a further tonic clonic seizure in January 2021. It is the FTT's treatment of these subsequent post decision events, particularly the 2020 seizure, which constitutes the substance of this appeal.

3. The Appellant made a claim for PIP on 5th February 2018. On 15th July 2019 the Respondent refused her claim. This decision was upheld on 2nd October 2019 following mandatory reconsideration. On 7th January 2021 the Appellant appealed the Respondent's refusal of her PIP claim to the FTT. For the sake of completeness, I note the Appellant made a new claim for PIP on 11th May 2021 and was awarded the enhanced rate for both the daily living and mobility components of PIP.

The appeal to the First-tier Tribunal

4. On 24th August 2021 the FTT refused the appeal and confirmed the Respondent's decision awarding 0 points for both the daily living and mobility components of PIP. In making its decision, while the FTT acknowledged the Appellant suffered an epileptic seizure in November 2020 resulting in her driving licence being withdrawn, it took the view these later events "*did not affect the assessment of risk at the time of the decision"*. On 31st January 2022 the FTT refused permission to appeal.

The Proceedings before the Upper Tribunal

5. The Appellant applied for permission to appeal against the FTTs decision. On 25th April 2022 Upper Tribunal Judge Jacobs gave permission to appeal to the Upper Tribunal in the following terms "Section *12(8)(b) of the Social Security Act 1998 limits the tribunal to the circumstances obtaining at the time of the decision. In this case, the time was the period between the date of claim (5 February 2018) and the date when the Secretary of State refused the claim (15 July 2019). The tribunal had to identify the extent to which the claimant could perform the activities in the daily living and mobility components at that time. In doing so, it focused on the evidence available at that time, including in particular the decision that the claimant could drive a car. It is possible that the tribunal failed to give sufficient significance to subsequent events. It is right that they were unknown at the time of the claim, but the risk may have existed at that time albeit that it was only shown retrospectively."*

6. The appeal was transferred from Judge Jacobs to me. I held an CVP hearing of the appeal on 21st February 2024. This was attended by the legal representatives of both parties and the appellant's partner.

7. Counsel for the Appellant, Mr Law, submitted the FTT were in error of law on a number of grounds. Firstly, it was argued the FTT erred in failing to give any or sufficient weight to the 2020 seizure in assessing the Appellant's ability to carry out activities safely. In the alternative, it was argued that the FTT erred in giving reasons that were insufficient to avoid substantial doubt that it had erred in law regarding the weight to be given to the 2020 seizure either because it appeared to endorse the view that it had given rise to new circumstances or alternatively because if the seizure did give rise to new circumstances (because the epilepsy had deteriorated) the FTT made insufficient findings of fact on the issue.

8. Mr Law's main argument at the oral hearing was that the FTT was in error in improperly excluding the later evidence (in particular the 2020 seizure) due to a misunderstanding of the scope and meaning of s12(8)(b) and it was wrong to place a temporal bar of 19.7.21 (the date of decision) in considering the subsequent events based on *when* the evidence was produced. He referred specifically to the letter from Dr McCorry the Appellant's neurologist and epileptologist dated 19th February 2021 which sets out the history of the appellant's epilepsy to that point. He argues in this way the FTT misdirected itself as to the meaning of s12(8)(b) as the provision relates to *circumstances* obtaining at the decision not *evidence* obtaining at the time of the decision, and this ultimately skewed its assessment of the risk of harm to the appellant.

9. Mr Edwards for the Respondent argued on the basis of the evidence "*it was not foreseeable for the Respondent to identify a risk that, well over a year after he decision, the Appellant would suffer a further seizure and her driving licence would be withdrawn."* It was suggested to impose what amounts to a test of "hindsight" on the fact-finding functions of the FTT is not consistent with the terms of section 12(8)(b) of the Social Security Act 1998 and had the FTT taken these later events into consideration that in itself would be an error of law. I mention in passing that while the test of foreseeability is significant in civil litigation, it does not specifically form part of the legislative criteria which the FTT considers when deciding an appellant's eligibility for an award of PIP and to read it into the consideration of s12(8)(b) adds an unnecessary gloss to the provision.

10. In oral argument Mr Edwards put considerable emphasis on the "window" in which the facts are relevant for the FTT to make its decision this being between the date of claim and the date of the decision. He also referred to the relevant qualifying period or "required period condition" (in this case 3 months before and 9 months after the prescribed date) which afforded a narrow temporal scope to the FTT's consideration of the facts.

11. Essentially the respondent argued the effect of s12(8)(b) of the Social Security Act 1998 was to preclude the FTT from taking the post decision events into account and that the FTT was not in error of law on this basis. He argued the decision maker and the FTT as a result of the section could only proceed on what they knew within the "decision making window" ie up to July 2019 and that a subsequent epileptic seizure did not affect the *risk at the time of the decision*. He submitted to do otherwise would amount to speculation on the part of the FTT and although the risk may have existed at the time, this has only become known retrospectively and neither the Respondent nor the FTT could have known that at the time.

12. For the sake of completeness, in response to the issues raised by the Appellant in the written submissions and at hearing regarding the adequacy of the FTT's reasons the Respondent also submitted the reasons provided by the FTT were adequate. I thank both representatives for their helpful oral and written submissions.

T**he legislation**

13. Section 12(8)(b) of the Social Security Act 1998 provides that a tribunal:
"*shall not take into account any circumstances not obtaining at the time when the decision appealed against was made."*

14. This paragraph does not of course prevent a tribunal having regard to evidence that was not before the Secretary of State and came into existence after the decision was made or to "*evidence of events after the decision under appeal was made for the purpose of drawing inferences as to the circumstances obtaining when or before the decision was made." 1.456 Volume III Social Security Legislation.*

15. I consider the comments of Commissioner Jacobs (as he then was) in R(DLA) 2/01 to be helpful when considering the scope of this provision particularly paragraph 9 where he states "...*it is the time to which the evidence relates that is significant, not the date when the evidence was written or given. It does not limit the tribunal to the evidence that was before the officer who made the decision. It does not limit the tribunal to evidence that was in existence at that date. If the evidence is written or given after the date of decision under appeal, the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible. If it relates to a later time, it is not admissible*."

16. Similarly in R(DLA) 3/01 Commissioner Jacobs at paragraph 55 concludes *"..It [section 12(8)(b)] refers to "any circumstances not obtaining at the time the decision was made." It does not refer to circumstances "not existing" at that time.... In its context, a circumstance must be "obtaining at the time when the decision appealed against was made" if it existed at any time during that period...Section 12(8)(b) only applies to fresh circumstances occurring after the decision was made."* While Commissioner Jacobs declined to precisely define "fresh circumstance" he did give the example in that case that a slower than expected post operative recovery was *not* a fresh circumstance for the purposes of section 12(8)(b) whereas someone recovering from heart surgery who developed pneumonia did come within the meaning of "fresh circumstance".

17. In *JS VSSWP 2011 UKUT 243 AAC* Judge Ward follows the approach in R(DLA) 2/01 and R(DLA) 3/01, concluding evidence coming into existence after the date of the decision could be relied on so far as relevant to show the circumstances pertaining at the date of decision. In that case, where there was evidence of a recent diagnosis of depression, recent weight loss, low weight and very low body mass index (BMI), the tribunal in its inquisitorial role ought to have followed this up to see if this was a symptom of untreated depression, or at least made clear what it made of this evidence.

18. I also note in CDLA/3293/2000 the Commissioner held that section 12(8)(b) did not preclude a tribunal from using hindsight to fix the length of an award they considered should be made.

Error of law

19. The question for the Upper Tribunal is whether the FTT made a material error of law. In my judgment the FTT was in error of law in this case.

20. Firstly, I am satisfied the FTT made a significant mistake of fact in terms of its assessment of the Appellant's medical conditions. At paragraph 4 of its written reasons, it notes "Mrs S *claims she has epilepsy*" and subsequently refers to convulsive seizures in the context of other potential causes such as sleep deprivation (para 11). The Respondent's representative also states in his written submission that at the date of decision the Appellant "did not have a diagnosis of epilepsy". This is incorrect. The report of Dr McCorry of 19th February 2021 clearly states the Appellant was first diagnosed with epilepsy on *8th March 2002.* While I accept diagnosis is not determinative in the context of assessing functional ability in relation to PIP, it is important evidence. On reading the FTTs written reasons it does afford significant consideration to other potential causes for the seizures (para 11). This was a significant mistake of fact. However, it is the Appellant's functional ability that is relevant to the assessment of PIP entitlement, rather than having a diagnosis per se. On that basis I am not persuaded this error materially affected the FTT's findings and ultimately its decision.

21. The Appellant's main argument is that by improperly excluding evidence post-dating the date of the decision under appeal the FTT both misdirected itself as to

the application of s12(8)(b) to the evidence in the case and on this basis its assessment of risk as it applied to the Appellant at this time was necessarily flawed. I consider this argument has some force in logic.

22. In my judgment, epilepsy is a condition where it is important for the FTT to make very clear findings of fact indeed. This is because it is vital to the assessment of risk and whether an Appellant can be said to perform activities "safely" in the context of Regulation 4(2A) (a) of the Social Security (Personal Independence Payment) Regulations 2013 ie whether there was a real possibility that could not be ignored of harm occurring, having regard to the nature and gravity of the feared harm in this case. Both the likelihood of the harm occurring, and the severity of the consequences are relevant (*RJ, GMcL and CS v SSWP v RJ (PIP) [2017] UKUT 105 (AAC)*. Chief among these findings, in my view, is whether the Appellant receives a "warning" in relation to the seizures such as would enable her to take pre-emptive action to prevent, or at the very least minimise, the risk of harm in the event of a seizure and thus allow her to perform the activity safely. While there is some reference to this in paragraph 16 of the FTT's written reasons it has not gone on to make definitive findings of fact in relation to whether the Appellant receives a warning before each episode and in these circumstances, I consider its assessment of risk and "safely" to be fundamentally flawed and in error of law. In my judgment the FTT failed in its inquisitorial role to fully explore these considerations both in terms of its findings of fact and its limited consideration of the admissibility of evidence regarding "the 2020 seizure".

23. In terms of the FTT's consideration of the status of the post-decision evidence, paragraph 25 of the written reasons somewhat cryptically reads *"We acknowledge Ms S subsequently had an epileptic seizure and her licence was taken away. But this latter event did not affect the assessment of risk at the time of the decision*". In my view much more detailed consideration of the application of s12(8)(b) to the evidence in this appeal is required. Why was this the case? On what basis did the FTT come to this conclusion? This was an issue of great, possibly determinative, significance in this appeal and the *blanket rejection* of this evidence by the FTT is, in my view, without further consideration of the application of s12(8)(b) to the particular circumstances of this case, in error of law. I would add the reasons advanced for this view are not in my judgment adequate to explain the view taken by the FTT.

24. Directions for the re-determination of the appellant's appeal

I direct as follows:

1. The appeal against the Secretary of State's decision of 15th July 2019 is remitted to the First-tier Tribunal for re-determination.

2. The composition of the Tribunal panel that re-determines the appeal must not include any member of the panel whose decision I have set aside.

3. If the appellant wishes the First-tier Tribunal to hold an oral hearing before her remitted appeal is determined she must make a written request to the First-tier Tribunal to be received by that Tribunal within one month of the date on which this decision is issued.

4. If the appellant wishes to rely on any further written evidence or argument, it is to be supplied to the First-tier Tribunal so that it is received by that Tribunal within one month of the date on which this decision is issued.

Apart from directions 1 and 2, these directions are subject to any case management directions given by the First-tier Tribunal.

The parties are reminded that the law prevents the First-tier Tribunal from taking into account *circumstances* not obtaining at the date of decision under appeal (section 12(8) of the Social Security Act 1998). This does not prevent the tribunal from taking into account evidence that came into existence after that date if it says something relevant about the circumstances at 15th July 2019.The FTT may wish to consider the decisions of Commissioner Jacobs (as he then was) in R(DLA) 2/01 and R(DLA) 3/01 and make findings of fact on whether the post decision evidence was a "fresh circumstance" para 62 R(DLA) 3/01 or simply the continuation of a pre-existing condition reflecting the natural vagaries of the Appellant's epilepsy.

(Signed on the Original)

E Fitzpatrick
Judge of theUpper Tribunal
Date 1st March 2024