



Neutral Citation Number: [2025] UKUT 015 (AAC)

Appeal No. UA-2024-000320-ULCW

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Between:

KS

Appellant

- v -

1. The Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Church

Decided on consideration of the papers

Representation:

Appellant: Mr Kempson of Wolverhampton Council Welfare Rights Service

Respondent: Ms Reid of DMA (Decision Making and Appeals), DWP

On appeal from:

Tribunal: The First-tier Tribunal (Social Entitlement Chamber)

Tribunal Case No: SC053/23/00886

Tribunal Venue: Wolverhampton (remote telephone hearing)

Decision Date: 05 September 2023

SUMMARY OF DECISION**UNIVERSAL CREDIT (45) Other (45.9)**

Judicial summary

In this appeal the Upper Tribunal considers the Universal Credit Regulations 2013 (“**UC Regulations**”) and the Social Security (Medical Evidence) Regulations 1976 (“**Medical Evidence Regulations**”) and decides that:

- a. regulation 28(2)(b) of the UC Regulations does not preclude a self-certification from starting the 3-month waiting period before a claimant may be entitled to the LCWRA element of Universal Credit,
- b. it was "unreasonable" (for the purposes of regulation 2(1A) of the Medical Evidence Regulations) for the Secretary of State to require the Claimant to provide a medical certificate in accordance with Part I of Schedule 1 to the Medical Evidence Regulations in circumstances where she had made a note in her UC journal asking whether she needed to provide a medical certificate given that she was unavailable for work because of her responsibilities as a carer to her disabled daughter and that query had gone unanswered,
- c. the Claimant's report that she was suffering from health problems that affected her ability to work and was in receipt of PIP, together with the Fit Note she provided on 24 February 2022 (speaking to the period from 14 April 2021) amounted to "such other evidence as may be sufficient to show that [the Claimant was] incapable of work or [had] limited capability for work so that [she] should refrain... from work by reason of some specific disease or bodily disablement or mental disability" for the purposes of regulation 2(1A) of the Medical Evidence Regulations. The 'backdated' Fit Note served to 'bridge the gap' between the Claimant's initial self-certification and the date on which the Fit Note was provided.

The FtT Decision is re-made, allowing the appeal, setting aside the Secretary of State's decision, and deciding that the “relevant period” for the purposes of regulation 28 of the UC Regulations commenced on 17 April 2021 (and not 24 February 2022, as previously decided).

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law that was material. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007 (“**TCEA**”), I set that decision aside and re-make the decision in the following terms:

“The Secretary of State’s decision of 10 November 2022 is set aside.

The claimant has LCWRA with an effective date of 17 April 2021, when the claimant provided evidence satisfying the requirements of regulation 2(1A) of the Social Security (Medical Evidence) Regulations 1976, from which date the “relevant period” for the purposes of regulation 28 of the Universal Credit Regulation 2013 commenced.”

REASONS FOR DECISION

Introduction

2. This appeal is about the proper meaning and application of the Universal Credit Regulations 2013 (the “**UC Regulations**”) and the Social Security (Medical Evidence) Regulations 1976 (the “**Medical Evidence Regulations**”).
3. In the proceedings before the First-tier Tribunal it was accepted that the Appellant (to whom I shall refer as the “**Claimant**”) had Limited Capability for Work and Limited Capability for Work Related Activity (for the purposes of the UC Regulations) from 24 February 2022.
4. The only issue before the First-tier Tribunal was whether, following a Work Capability Assessment (“**WCA**”) and a finding that the claimant had Limited Capability for Work (“**LCW**”) and Limited Capability for Work Related Activity (“**LCWRA**”), the applicable three month period before the Claimant would be entitled to the LCW element of Universal Credit (“**UC**”) started to run from the date of the Claimant’s first Statement of Fitness for Work (commonly known as a “**Fit Note**”) or from the (much earlier) date on which the claimant first reported a health condition in her Universal Credit journal.

The agreed factual background

5. The claimant made a claim for Universal Credit on 27 March 2018. At that time she didn't disclose any health conditions that would affect her capacity for work.
6. On 17 April 2021 the claimant made a declaration on the Universal Credit online system stating that she had a health condition that affected her capacity for work and that she was a carer for her disabled daughter. She queried the need to provide a Fit Note. She received no response to that query.
7. On 24 February 2022 the Claimant provided a Fit Note dated 15 April 2021.
8. The Claimant was referred for a Work Capability Assessment.
9. On 10 November 2022 a decision maker for the Secretary of State decided that the Claimant had LCW and LCWRA and was entitled to the LCWRA element of UC from the effective date of 24 February 2022 (being the date that the Fit Note dated 15 April 2021 was submitted) and that the 'relevant period' for the purposes of the UC Regulations commenced on that date (the "**SoS Decision**").
10. The Claimant asked for a mandatory reconsideration of the SoS Decision. The SoS Decision was reconsidered on 9 March 2023 but the SoS Decision was confirmed. The Claimant then appealed to the First-tier Tribunal with the only matter in issue being the effective date of the SoS Decision and the corresponding effect on the date from which the LCWRA element of UC was payable. period
11. The Claimant appealed to the First-tier Tribunal against the SoS Decision.
12. The panel of the First-tier Tribunal which convened to hear the matter on 05 September 2023 (the "**Tribunal**") dismissed the appeal (the "**FtT Decision**") and confirmed the SoS Decision. However, the District Tribunal Judge on the panel later allowed the Claimant's application for permission to appeal the FtT Decision to the Upper Tribunal on the basis that, while the judge did not agree with the interpretation of the relevant regulations proposed by the Claimant, the appeal raised "an important question as to the proper interpretation of a widely relied on Universal Credit provision".

Legal framework

13. Regulation 28 of the UC Regulations sets out the rules for determining the date from which an award of the LCWRA element of Universal Credit. It provides, so far as relevant to this appeal, as follows:

“Period for which the LCWRA element is not to be included

28.-(1) An award of universal credit is not to include the LCWRA element until the beginning of the assessment period that follows the assessment period in which the relevant period ends.

(2) The relevant is the period of three months beginning with-

(a) if regulation 41(2) applies (claimant with monthly earnings equal to or above the relevant threshold) the date on which the award of universal credit commences or, if later, the date on which the claimant applies for the LCWRA element to be included in the award; or

(b) in any other case, the first day on which the claimant provides evidence of their having limited capability for work in accordance with the Medical Evidence Regulations.”

14. Regulation 2(1) of the Medical Evidence Regulations sets out a requirement for medical evidence to be provided in respect of benefit claims. It provides:

“Evidence of incapacity for work, limited capability for work and confinement

2.-(1) Subject to regulation 5 and paragraph (1A) below, where a person claims to be entitled to any benefit, allowance or advantage (other than industrial injuries benefit or statutory sick pay) and entitlement to that benefit, allowance or advantage depends on that person being incapable of work or having limited capability for work, then in respect of each day until that person has been assessed for the purposes of the personal capability assessment or the limited capability for work assessment they shall provide evidence of such incapacity or limited capability by means of a statement given by a healthcare professional in accordance with the rules set out in Part 1 of Schedule 1 to these Regulations.

(1A) Where it would be unreasonable to require a person to provide a statement in accordance with paragraph (1) above that person shall provide such other evidence as may be sufficient to show that they are incapable of work or have limited capability for work so that they should refrain (or should have refrained) from work by reason of some specific disease or bodily or mental disability.”

15. Regulation 5(1) and following of the Medical Evidence Regulations provides for an initial period of self-certification by claimants:

“The evidence of ... limited capability for work required for the purposes of determining entitlement to benefit, allowance or advantage referred to in regulation 2(1)-

...

(d) in respect of any of the first 7 days of a longer period of limited capability for work, may consist of a self certificate instead of a certificate in the form of a statement in writing given by a healthcare professional in accordance with regulation 2(1).”

16. Regulation 38 of The Universal Credit, Personal Independence Payment, Jobseekers’ Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 places an obligation on claimants (and others receiving benefits) to notify changes of circumstances. It provides:

“(1) This regulation, apart from paragraphs (7) and (9), applies to any person entitled to benefit, other than a jobseekers’ allowance, and any other person by whom, or on whose behalf, payments by way of such a benefit are receivable.

...

(4) A person to whom this regulation applies must notify the Secretary of State of any change of circumstances which the person might reasonably be expected to know might affect-

- (a) the continuance of entitlement to benefit;
- (b) the amount of benefit awarded; or
- (c) the payment of benefit,

As soon as reasonably practicable after the change occurs.”

The First-tier Tribunal’s decision

17. The Tribunal explained its reasons for dismissing the Claimant’s appeal as follows:

“9. Whilst the Tribunal accept that the [Claimant] may have made attempts to provide the sick note earlier, and that her queries raised with the DWP went unanswered; it was undisputed that the [Claimant] did not in fact provide the sick note until 24/02/2022.

10. The Tribunal’s interpretation and application of the above Regulation is that it is a date on which the [Claimant] provided the sick note (in this case 24/02/2022) that applies.

11. Mr Kempson for the [Claimant] presented a different interpretation, and submitted that the Regulation did not preclude a backdated sick note from being actioned, and that the difficulties the [Claimant] encountered with providing the sick note should be taken into account. It was submitted that had the DWP answered the queries raised by the [Claimant] on 17/04/2021 the sick note would have been provided at that stage.

12. The Tribunal disagree with this interpretation. Whilst we were not unsympathetic to the [Claimant]'s position, the UC Regulations can be unforgiving, and on this occasion the Appeal had to be refused."

The grounds of appeal

18. Mr Kempson of Wolverhampton Council's Welfare Rights Service argued that on its proper interpretation Regulation 28(2)(b) of the UC Regulations doesn't preclude a backdated Fit Note from starting the 3 month 'relevant period' upon the expiry of which the LCWRA element may be added to a UC award. That provision requires a claimant to provide "evidence of their having limited capability for work in accordance with the Medical Evidence Regulations". The Medical Evidence Regulations impose a requirement on a claimant who is claiming a benefit where entitlement is dependent on his being incapable of work to "furnish evidence of such incapacity in respect of that day or days to which his claim relates". While they specify that this shall take a particular form (i.e. a Fit Note), they say that satisfaction of the requirement for evidence may be achieved "by such other means as may be sufficient in the circumstances of any particular case". Regulation 2(1A) further provides that where it would be "unreasonable" to require a person to provide a Fit Note, that person shall provide such other evidence as may be sufficient to show that they are incapable of work or have limited capability for work so that they should refrain (or should have refrained) from work by reason of some specific disease or bodily or mental disability."
19. Mr Kempson says that where, as here, a claimant has asked about whether she need to provide a Fit Note and her question has not been answered, it was "unreasonable" to require her to provide a Fit Note. Further, the Claimant's self-certification in the form of her entry in her UC journal on 17 April 2021 (see page 8 of the FtT bundle) which disclosed her difficulties with Fibromyalgia, Scheurmann's Disease and Spondylitis, as well as her receipt of a Personal Independence Payment and her having caring responsibilities in respect of her disabled daughter, should have been accepted as "sufficient evidence".

20. Mr Kempson says that in all the circumstances the LCWRA element should have been added to the Claimant's UC award 3 months after 17 April 2021, and not 3 months after 22 February 2022 (as it was).

Analysis

21. The upshot of regulation 28 of the UC Regulations (so far as applicable to the Claimant's circumstances) is that the Claimant is not entitled to the LCWRA element of Universal Credit until the beginning of the assessment period that follows the assessment period in which the "relevant period" ends. The "relevant period" for these purposes is the period of three months beginning with the first day on which the Claimant provided evidence of having limited capability for work in accordance with the Medical Evidence Regulations.
22. The first question is whether the Claimant's reporting in her Universal Credit journal that she had health problems affecting her ability to work satisfied regulation 5(1) (and following) of the Medical Evidence Regulations in respect of the first 7 days of a longer period of limited capability for work. I can see no reason why it should not, given that that provision expressly permits an initial period of self-certification. I conclude that regulation 28(2)(b) of the UC Regulations does not preclude a self-certification from starting the 3-month waiting period before a claimant may be entitled to the LCWRA element of Universal Credit.
23. This 'opens the door' to the medical evidence being treated as having been provided from the date of the 17 April 2021 UC journal entry.
24. While regulation 2(1) of the Medical Evidence Regulations requires a claimant to provide medical evidence for each day for which a limitation in capability is claimed in the form of a statement given by a healthcare professional in accordance with the rules set out in Part 1 of Schedule 1 (i.e. a Fit Note), this requirement is subject to the exception provided by regulation 2(1A) if it would be "unreasonable" to require evidence to be provided in that prescribed form.
25. In this case the Claimant reported her change of circumstances (in terms of her health difficulties and their impact on her capability for work, as well as her caring responsibilities) timeously in her UC journal, and she also queried the requirement for a Fit Note. Given her circumstances, that was a reasonable query to raise. She received no response. I am satisfied that it was "unreasonable" (for the purposes of regulation 2(1A) of the Medical Evidence Regulations) for the Secretary of State to require the Claimant to provide a medical certificate in

accordance with Part I of Schedule 1 to the Medical Evidence Regulations for as long as the Claimant's query went unanswered.

26. I am satisfied that the Claimant's report that she was suffering from health problems that affected her ability to work and was in receipt of PIP, together with the Fit Note that she provided on 24 February 2022 (speaking to the period from 15 April 2021) amounted to "such other evidence as may be sufficient to show that [the Claimant was] incapable of work or [had] limited capability for work so that [she] should refrain... from work by reason of some specific disease or bodily disablement or mental disability" for the purposes of regulation 2(1A) of the Medical Evidence Regulations. The 'backdated' Fit Note served to 'bridge the gap' between the Claimant's initial self-certification and the date on which the Fit Note was provided.

Conclusion

27. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision under section 12(2)(a) of the TCEA.
28. Under section 12(2)(b)(ii) of the TCEA I re-make the decision as it should have been made, in the terms set out at the beginning of this decision.

**Thomas Church
Judge of the Upper Tribunal**

Authorised by the Judge for issue on 14 January 2025