



DECISION OF

Lady Poole

IN THE APPEAL BY

Social Security Scotland

Appellant

- and -

FK

Respondent

FTS Case reference: FTS/SSC/AE/23/00030

Representation:

For the appellant: Anderson Strathern, solicitors

For the respondent: Welfare Rights, North Lanarkshire Council

17 April 2024

DECISION

The appeal is allowed. The decision of the First-tier Tribunal for Scotland (“FTS”) of 27 October 2023 and intimated in a statement of reasons dated 2 November 2023 is quashed. The case is remitted to a differently constituted tribunal of the FTS for reconsideration, in accordance with the directions at the end of this decision.

REASONS FOR DECISION

Introduction and summary



1. This is a case about adult disability payment (“ADP”). ADP is targeted towards people who have impairments with significant and not short-term effects. To ensure that ADP awards are channelled to these types of impairments, one of the conditions of entitlement for ADP is the “required period” condition. As a generality, claimants only qualify for ADP if they suffer specified limitations on ability every day in a period of one year (the same length as the one year period in the Equality Act 2010 sections 6 and schedule 1 paragraph 2 for the protected characteristic of disability). The one year period to qualify for ADP starts in many cases from 13 weeks before the date the claim is made, and ends 39 weeks after it. It is only if a person would have limited ability every day in the required period, and meets other conditions of entitlement, that they will qualify for ADP.
2. The issue in this appeal is whether the FTS dealt appropriately with the required period condition. The FTS found that the appellant (“FK”) was entitled to an award of the daily living component of ADP at the standard rate. Its reasons for awarding points for a number of activities specify limitations due to a hernia. It is not self evident that limitations based on a hernia would meet the required period condition. The FTS has not properly explained the basis on which it considered the required period condition was satisfied in this case, and accordingly has erred in law by giving inadequate reasons for its decision.
3. The reasons for this conclusion are set out below. They set out procedural matters, the governing law, and explain why the FTS erred in law.

Procedure to determine this appeal

4. The procedure in this appeal is governed by the Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018 (the “**UTS Rules**”). Under rule 22, the Upper Tribunal for Scotland (“**UTS**”) may make any decision without a hearing. Before deciding whether to proceed with or without a hearing, the UTS must take into account any view expressed by a party.
5. Social Security Scotland, the appellant (“**SSS**”), submits in its notice of appeal that the case should be determined without an oral hearing. FK has also indicated through his representative that he wishes the case to be determined without an oral hearing.
6. It is fair and just to determine this appeal on the papers in all of the circumstances. Both parties have been given an opportunity to make written submissions, although FK has



elected not to do so. Neither party wishes an oral hearing. There is sufficient information before the UTS to determine the appeal.

Procedural history of the case

7. FK applied to SSS for an award of ADP on 11 August 2022. FK reported suffering from multiple medical conditions including a hernia. FK had also suffered from a heart attack in January 2022, although had recovered sufficiently that he had been certified as fit to work again, subject to restrictions such as not lifting heavy weights. There were other medical issues mentioned, including but not limited to pain, feelings of anxiety and depression since his heart attack, an enlarged prostate, and diabetes.
8. On 25 October 2022, SSS decided that FK was entitled to an award of the mobility component of ADP at the standard rate on the basis that he scored 8 points for mobility activity 12 (moving around). SSS found that FK was not entitled to the daily living component because he did not score enough points (he was found to score 2 points each for daily living activities 1 and 6 (preparing and cooking a simple meal, and dressing and undressing)).
9. FK, through his representative, requested SSS to redetermine his claim, seeking points under all daily living and mobility descriptors. SSS gathered further information, and reconsidered FK's claim. On 30 December 2022, SSS decided on redetermination that FK was not entitled to ADP at all, because he scored no points for any daily living or mobility activities.
10. FK appealed to the FTS on 25 January 2023. On 27 October 2023, the FTS heard the appeal and decided that FK was entitled to the daily living component of ADP at the standard rate (but not the mobility component). The FTS found that FK was entitled to 8 points in respect of daily living activities, 2 points each for activities 1 (preparing and cooking a meal), 4 (washing and bathing), 5 (managing toilet needs), and 6 (dressing and undressing). The reasons given by the FTS on 2 November 2023 for awarding the points under activities 4, 5 and 6 all expressly refer to the consequences of FK's hernia.
11. SSS appealed the decision of the FTS. On 27 November 2023 the FTS granted permission to appeal to the UTS.

Governing law



12. Section 31 of the Social Security (Scotland) Act 2018 (the “**2018 Act**”) empowers the Scottish Ministers to give disability assistance, and to make regulations setting out eligibility rules. Chapter 1 paragraph 1(1) of schedule 5 to the 2018 Act provides that the regulations for disability assistance must be framed so that:

“an individual’s eligibility in respect of a given period depends on the individual having, during that period, -

(a) a physical or mental impairment that –

(i) has a significant and not short-term adverse effect on the individual’s ability to carry out normal day-to-day activities, or

(ii) otherwise gives rise to a significant and not short-term need; or

(b) a terminal illness.

13. The regulations containing the eligibility rules for disability assistance which apply in this case are the Disability Assistance for Working Age People (Scotland) Regulations 2022 (the “**ADP Regulations**”). Regulation 3 summarises the various conditions which must be met before a claimant is eligible for ADP. These include qualifying for the daily living and/or mobility component of ADP. Under regulations 5(2)(b), 5(3)(b), 6(2)(b) and 6(3)(b), claimants can only qualify for the daily living and/or mobility components if they meet the required period condition. The required period condition is further explained in part 4 of the ADP Regulations, containing regulations 10 to 13. Regulation 11 applies to the daily living component and regulation 12 to the mobility component, but the operative part of both of those regulations is:

“An individual meets the required period condition... where, if the individual’s ability to carry out the [daily living/mobility] activities were determined every day in the required period, it is likely that the Scottish Ministers would determine on all of those days that the individual had limited or, as the case may be, severely limited ability to carry out the mobility activities”.

For initial claims for ADP such as the one in this case, regulation 10(3)(a) defines the required period as the period of:

“13 weeks ending with the relevant date together with...(ii)...the period of 39 weeks beginning with the day after the relevant date”.

14. The relevant date is an important date for application of the required period condition. For initial claims the relevant date will often be the date of the application, but it may be later. Regulation 13(a) provides, insofar as relevant:

“... the “relevant date” is –

(a)...where the individual has made an application for ADP which has not been determined

(i) the date of that application, or



(ii) if later, the earliest date in relation to which, if the individual's ability to carry out daily living activities or, as the case may be, mobility activities, had been determined on every day in the previous 13 weeks, it is likely that the Scottish Ministers would have determined on all of those days that the individual has limited ability or, as the case may be severely limited ability to carry out those activities".

Why the FTS erred in this case

15. In FK's case, multiple medical conditions were reported. Some of those medical conditions might be expected to cause functional limitation (eg some hernias might limit bending and lifting), but some conditions might not (eg raised blood pressure). Some might be expected to give rise only to short term limitations on ability (eg a dislocated finger), and some might be more enduring.
16. The rules for ADP make it clear that suffering from a medical condition or conditions, and taking medication, is not enough for an award. The eligibility rules focus on functional limitation as a result of physical and/or mental conditions. By the required period condition, the eligibility rules also ensure that only longer term functional limitations will meet the criteria for an award. In this way finite public funds are targeted where the legislature considers they are most needed.
17. Another consequence of the required period condition is that a person is not entitled to an award just because, on the day of a FTS hearing, their functional limitations would result in points being scored. Rather, before an award can be made, the FTS (and SSS before it) has to be satisfied the medical conditions from which the claimant suffers would have resulted in functional limitation adequate to score sufficient points for an award on every day during the one year required period (ADP Regulations, regulations 11 and 12).
18. In this case, limitations as a result of FK's hernia underlay many of the points the FTS found to be scored in respect of daily living activities. Pain as a result of a hernia was the reason the FTS found that an aid or appliance for washing and bathing and rising safely from the toilet were required (paragraphs 30 and 31), and difficulties bending as a result of the hernia were mentioned in the findings about difficulties dressing his lower half (paragraph 32). Hernias do not necessarily give rise to the type of substantial and sufficiently enduring type of limitation covered by the ADP Regulations, particularly when potential treatments are taken into account. Given the basis on which the FTS found there was functional limitation, the required period condition became a substantial



question in issue in this particular case. The FTS ought to have explained why it considered the required period condition was satisfied, on the basis of the facts it found.

19. The FTS, in an otherwise well-written decision, referred at paragraph 22 to the required period condition, but failed to explain what that period was on the facts of this case or how it applied to the facts found by the FTS. The application was made on 11 August 2022. The findings in fact established that the hernia was diagnosed 2-3 weeks prior to 8 September 2022 (paragraph 3); the GP had provided a Med 3 dated 9 August 2022 stating FK should avoid heavy lifting and amended duties at work for a period of 56 days on account of inguinal hernia (paragraph 10); the GP had written to the FK on 12 August 2022 providing information about inguinal hernia (paragraph 8); the hernia was noted in FK's medical records from 9 August 2022; and he was still on a waiting list for surgery at the time of the hearing (23 October 2023). The reference to hernia is roughly contemporaneous with the time FK contacted SSS to make his application for ADP. It is not clear from the decision of the FTS how the 13 week period before the date of application (or other date calculated in accordance with regulation 13(a)(ii)) was met. It may be that regulation 35 of the ADP Regulations, which governs when an application is to be treated as made, might have some application in this case in selecting the relevant date. But all of this is unexplained. There is no finding as to the relevant date under the ADP Regulations, and the factual position in the 13 weeks before that and 39 weeks after. The reasons given by the FTS on 2 November 2023 are accordingly inadequate.
20. In its refusal to review its decision dated 27 November 2023, the FTS sets out additional findings and reasons why the required period condition might be met at paragraphs 9 to 12. The issue of whether reasons for a decision can be supplemented in this way has not been argued before the UTS in this case, so the question of whether that is permissible is reserved. For present purposes, it is sufficient to say that even if the additional comments are taken into account, there are still inadequate reasons to explain how the required period condition was satisfied. It may be that limitations resulting from a hernia could predate a formal diagnosis, but it does not follow they subsisted from 13 weeks before the relevant date. The additional comments also refer to mental health issues and fatigue, but there is no finding in the reasons for the decision that those have caused functional limitation in ways set out in the daily living descriptors. Most people at times feel tired, or anxious, or of low mood, but it does not follow that these are physical or mental conditions that cause the type of substantial and longer term impairments which attract awards of the daily living or mobility components under regulations 5 and 6 of the ADP Regulations. The FTS's additional comments have the character of an *ex post facto* justification, rather than a decision being made about the required period condition with an open mind after hearing all evidence.



21. The FTS has accordingly erred in law by giving inadequate reasons in relation to the required period condition, an essential condition for eligibility for ADP. The decision must be quashed and remitted to a differently constituted tribunal for reconsideration.

DIRECTIONS

1. The case should be remitted to the FTS for reconsideration by a differently constituted tribunal.
2. The FTS should consider seeking from parties, in advance of the hearing, written submissions on (i) the relevant date under regulation 13 of the ADP Regulations, and whether regulation 35 is relevant to that question (ii) the start and end dates of the required period, having regard to regulation 10(3); and any further evidence parties wish to submit.
3. In reasons for its decision on the appeal, the tribunal should make clear findings as to the relevant date, and the start and end dates of the required period. It should explain the basis on which it concludes or does not conclude that, if activities were determined every day in the required period, on all of those days there would be limited or severely limited ability to carry out the relevant activities, within the meaning of regulations 11 and 12. In doing so, it should have regard to the guidance in paragraphs 1 and 12-20 above.

Lady Poole
17 April 2024

*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.*