

# Upper Tribunal for Scotland



2026UT11

Ref: UTS/AS/25/0130

## DECISION OF

Lord Duthie

### ON AN APPEAL

### IN THE CASE OF

GM

per Civil Legal Assistance Office

Appellant

- and -

Social Security Scotland

per Scottish Government Legal Directorate

Respondent

FTS Case Reference: FTS/SSC/AE/24/02072

16 January 2025

[1] On 11 June 2025, the First-tier Tribunal for Scotland (Social Security Chamber) ("the FTS") determined the appellant's entitlement to Adult Disability Payment, awarding the standard rate of the daily living component and refusing the mobility component. The appellant applied to the FTS for permission to appeal that decision on the basis of alleged errors of law. Permission was



refused. I subsequently granted permission to appeal under section 46(3)(b) of the Tribunals (Scotland) Act 2014. Parties thereafter agreed that the Upper Tribunal should determine the appeal without a hearing on the basis of written submissions.

[2] The appellant has peripheral neuropathy, diabetes, anxiety disorder, long covid, back pain and had a full oral clearance in 2010. He reports dyslexia, autism and dyspraxia although he has no formal diagnosis of these conditions. These conditions are all potentially relevant to issues of fatigue, pain and recovery time.

[3] The ground of appeal advanced is that the FTS failed to consider the impact of fatigue and pain on the appellant's ability to perform activities to an acceptable standard, as often as reasonably required, and within a reasonable time as required by Regulation 7(2)(b).

## **Appellant's submissions**

[4] The FTS erred in law by failing to apply Regulation 7(2)(b) of the Disability Assistance for Working Age People Scotland Regulations 2022, by making no pertinent findings on the impact of fatigue and pain on various daily living activities and mobility activity 2, and by not addressing whether the activities could be performed to an acceptable standard, as often as reasonably required, or within a reasonable time. Reference was made to *KW v Secretary of State for Work and Pensions* 2024 UKUT 410 and *LB v Secretary of State for Work and Pensions* 2024 UKUT 388 regarding the need to assess pain when determining acceptable standard, and to *RH v Secretary of State for Work and Pensions* 2025 UKUT 252 in respect of the repeatedly and reasonable time elements. There was evidence before the FTS anent missed meals, pain on chewing, substantial time managing insulin and therapy with support, lack of motivation to wash due to fatigue, pain and fatigue when dressing, severe pain and breathlessness when walking with frequent rests, post-exertional malaise, and significantly prolonged times to read, communicate and walk set distances. The FTS failed to consider these matters or to give adequate reasons, contrary to the guidance in *RC v Social*



*Security Scotland* 2025 UT 32 and *AK v Social Security Scotland* 2024 UT 5. The errors were material to the descriptors awarded.

## **Submissions for the respondent**

[5] The respondent does not oppose the appeal. However, following *McAllister v Secretary of State for Work and Pensions* 2003 SLT 1195, the Upper Tribunal must nevertheless be satisfied that an error of law has occurred before granting the appeal.

[6] Pain and fatigue may be relevant to the application of Regulation 7(2)(b). In this instant case the FTS made no findings in fact anent the appellant's pain or fatigue in relation to the daily living and mobility activities. The FTS did not consider whether the activities could be performed repeatedly or within a reasonable time. The FTS required to address the effect of pain and fatigue on the appellant's functioning.

[7] In the circumstances, the FTS erred in law. The decision should be quashed and the case remitted to the FTS for rehearing. There is no reason why the case could not be remitted to the same panel.

## **The FTS decision**

[8] The FTS's findings in its Decision Notice on the issues of fatigue, pain, repeatedly, acceptable standard and reasonable time are limited. They are at paragraphs 7 ("The Appellant has peripheral neuropathy, diabetes, anxiety disorder, long covid, back pain...") and 19 ("He would stop and rest if need be..."). The FTS does not make findings about how fatigue or pain affect any daily living activity, nor make findings on pain level, fatigue, post-exertional malaise or recovery time, nor address whether walking could be done repeatedly, to an acceptable standard, or within a reasonable time.

## **Decision**



[9] The FTS erred in law by failing to apply Regulation 7(2)(b) of the 2022 Regulations. It did not assess whether the appellant could carry out the relevant activities to an acceptable standard, as often as reasonably required, and within a reasonable time. It did not engage with the evidence of pain, fatigue, post-exertional malaise, or recovery time, and it made no sufficient findings in fact on those matters in relation to either the daily living or mobility activities. In the absence of such findings, the FTS could not properly determine whether the activities were performed safely, repeatedly, to an acceptable standard, and within a reasonable time. Those omissions constitute errors of law which are material to the descriptors awarded and not awarded.

[10] I quash the decision of the FTS and remit the case for a rehearing. This should be before a differently constituted tribunal so that the FTS can approach the task of fact finding afresh. I direct the FTS to make findings in fact anent the appellant's pain or fatigue in relation to the daily living and mobility activities and to apply Regulation 7(2)(b) of the Disability Assistance for Working Age People Scotland Regulations 2022 and to address whether the appellant can perform each relevant activity to an acceptable standard, as often as reasonably required, and within a reasonable time.

Lord Duthie  
Member of the Upper Tribunal for Scotland

*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.*