THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: CE/1167/2019
[2019] UKUT 303 (AAC)

JS
v
SECRETARY OF STATE FOR WORK AND PENSIONS

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Reference: SC297/18/01360
Decision date: 16 January 2019
Venue: Aberystwyth

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. The reconsideration must be undertaken in accordance with *KK v Secretary of State for Work and Pensions* [2015] UKUT 417 (AAC).

C. In particular, the tribunal must investigate and decide whether the claimant had good cause for failing to attend her appointment with a health care professional on 6 July 2018.

D. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: *R(DLA) 2 and 3/01*.

REASONS FOR DECISION

A. What this case is about

1. Decisions on entitlement to an employment and support allowance are made by decision-makers acting as the Secretary of State. Most involve advice from a health care professional. Typically, the advice is given following an interview with and an examination of the claimant, which take place after the claimant has completed a questionnaire setting out their disabilities. The procedure is for the claimant to be sent a time and date to attend for the appointment. A claimant who fails to attend 'without good cause' is treated as not having limited capability for work (regulation 23(2) of the Employment and Support Allowance Regulations 2008 SI No 794) and, therefore, as not entitled to an employment and support allowance. The issue identified by Upper Tribunal Judge Gray in her grant of permission to appeal was the relevance to be attached to previously missed appointments when assessing good cause. Anyone familiar with the assessment of evidence will not be surprised that the answer contains the words *it all depends*.

B. What happened in this case

2. The claimant was awarded an employment and support allowance in 2014. At that time, the award was based on an anxiety state, which was still current in July 2017. In May 2017, she completed a questionnaire about her disabilities. Essentially, she listed two causes of her difficulties: pain in her spine, pelvis and lower limbs; and depression, anxiety and panic attacks. There is a tribunal decision from 2006 recording an indefinite award of disability living allowance, which included the mobility component at the higher rate and was still in payment in February 2018.

3. The claimant was sent an appointment with a health care professional for 6 July 2018 at 3.45. At 8.25 on that morning, the claimant's husband phoned to report that she had fallen and was going to the hospital. In the event, she did not go to the hospital, saying it was not necessary. She later wrote that she was always having falls and sent some photographs of her injuries.

C. The decision-makers decided the claimant did not have good cause

4. The decision-maker decided that the claimant did not have good cause, saying that:

> … photos of her injuries and bruises … are of poor quality and the photos have not scanned successfully so I am unable to see any detail.
>
> … there appears to be a pattern of avoidance as this is the 6th WCA appointment the customer has not been able to attend for various reasons.
>
> In addition, [she] stated identical circumstances for not attending the WCA appointment 14/02/18.

The different decision-maker on mandatory reconsideration decided not to revise the decision. He referred to previous failures to attend in January, February, March, April and June 2018, and remarked that the claimant had not provided medical evidence in support, although she had previously been advised to do so.

D. The First-tier Tribunal dismissed the appeal

5. The tribunal decided the case in the claimant's absence. In summary, these are the reasons the judge gave for dismissing the appeal.

6. First, the evidence of the claimant and her husband was inconsistent. When he rang on the morning of the appointment, he said his wife would be going to hospital. When she made her appeal, she said that she had not done so.

7. Second, the decision-maker was entitled to expect some medical evidence to support the claimant's explanation.

8. Third, falls are unpleasant and upsetting but people are usually able to continue with their lives fairly shortly.

9. Finally, on the previously missed appointments, the judge said that they were a relevant consideration, although 'manifestly not determinative because the respondent must have accepted good cause on the other five occasions.' They did show that the claimant must have known the importance of attending the appointment and of having a good reason for not doing so.

10. Before coming to the previously missed appointments, I will comment on some of the other deficiencies with that reasoning.

E. Deficiencies in the judge's reasoning

11. First, inconsistent evidence. The two statements were not necessarily inconsistent. It is possible that when the fall occurred the claimant thought a visit to hospital was necessary, but decided later that this was not required. The statements may be inconsistent or they may not. The mere fact that they differ does not prevent there being a rational and reasonable explanation for the difference. The judge did not say whether he had considered other possibilities and why he had assessed the evidence as he did.

12. Second, the lack of supporting medical evidence. In order to get medical evidence, the claimant would have had to see a doctor. She did not do so, because she decided on reflection that a visit to the hospital was not necessary. But that does not mean that the fall was not significant for her. She experiences them regularly and doctors do not encourage patients to take up surgery time with such events.

13. Third, people get on with their lives after falls. This may be true as a generality, but the judge did not set his reasoning in the context of the claimant's disabilities as she set them out in her questionnaire or the award of disability living allowance which was indicative of mobility difficulties. The time of the

appointment was also surely significant. It would have been more understandable for the claimant to cancel an appointment in the early morning than one in mid-afternoon, by which time she would have had a chance to recover and assess whether she was in fact able to attend. But the judge made nothing of this.

F. Previous failures to attend – in principle

14. Regulation 24 provides:

> **24. Matters to be taken into account in determining good cause in relation to regulations 22 or 23**
>
> The matters to be taken into account in determining whether a claimant has good cause under regulations 22 (failure to provide information in relation to limited capability for work) or 23 (failure to attend a medical examination to determine limited capability for work) include–
>
> (a) whether the claimant was outside Great Britain at the relevant time;
>
> (b) the claimant's state of health at the relevant time; and
>
> (c) the nature of any disability the claimant has.

15. In principle, the significance of previously missed appointments will depend on the circumstances of the case. A decision-maker, and therefore a tribunal, has to consider the circumstances of the failure to attend that led to the decision under appeal. The explanation given and the evidence presented by the claimant will always be relevant. Previously missed appointments may also be relevant to that assessment. As may the evidence available about the claimant's health and disabilities (regulation 24(b) and (c)). The decision-maker and the tribunal are not making an assessment of the claimant's capability for work, but they are entitled to take account of the evidence provided for that purpose when deciding whether the claimant had good cause.

16. Take first a claimant whose explanations refer to the same condition. Much will depend on the nature of that condition. It should come as no surprise if there are repeated failures to attend on account of agoraphobia. There would be no cause for suspicion. Quite the contrary, an ability to attend sometimes but not others could call into question the claimant's asserted disability. In contrast, if the claimant's condition is variable, chronic fatigue syndrome say, variation is to be expected and not of itself a cause for suspicion.

17. The position may be more complicated if the claimant gives different reasons for not attending on successive occasions. By definition, the decision-maker will have accepted good cause on the earlier occasions. There is no question of changing those decisions, but a later decision-maker may conclude, looking back at the history of the case and taking account of evidence now available, that there has been a pattern of avoidance by the claimant. Even then, it is important to focus on the current failure. The previous conduct may justify

careful scrutiny of the current failure, with perhaps a request for supporting evidence. But even a claimant with a lengthy history of failing to attend for what appear, in hindsight, to be highly dubious reasons may still be delayed by inclement weather or have a domestic emergency. And a claimant who has more than one disabling condition may be prevented from attending for different reasons on different occasions.

18. In short, it all depends, which means that tribunals need to take care in their reasoning to show whether they took any account of a claimant's previous failures and, if so, how in order to demonstrate that their relevance was assessed rationally, taking account of points both for and against the claimant.

G. Previous failures to attend – this case

19. The Secretary of State's representative has supported the appeal on the ground that the tribunal misused the evidence of previously missed appointments. I accept the submission that the tribunal made an error of law, but for different reasons.

20. The judge said that the previous history of failures to attend was relevant but not decisive. That was correct. On relevance, he used the claimant's experience as evidence of her knowledge of the importance of attending and of producing evidence to support any failure to attend. He was right about that. But that was not a comprehensive coverage of how the history might be relevant. In particular, he did not show that he had considered whether the history supported the claimant's explanation on this occasion. He knew the reason for the failure to attend in February, because the decision-maker had noted that the claimant had given the same reason on that occasion, taking that as cause for suspicion. But it could equally be supportive of the claimant if it was consistent with the evidence of her disabilities. And the judge knew the reasons for the failure to attend in April, which were in the papers. But that was all; he did not know about the others. Nor did the judge consider what was known of the claimant's disabilities and whether they might support the reasons given by the claimant for not attending. In conclusion, the judge's coverage was incomplete and the tribunal's decision in error of law.

Signed on original
on 07 October 2019

Edward Jacobs
Upper Tribunal Judge