



**DECISION OF
LADY POOLE
IN THE APPEAL BY**

NB

Appellant

- and -

Social Security Scotland, PO BOX 10301, Dundee, DD1 9FW

Respondent

FTS Case Reference: FTS/SSC/AE/23/00067

Representation

For the Appellant: in person

For the Respondent: Denis Edwards, advocate; Anderson Strathern

7 November 2023

Decision

The appeal is allowed. The decision of the First-tier Tribunal for Scotland (“FTS”) of 24 July 2023 is quashed. The case is remitted to the FTS for redetermination, in accordance with the directions made at the end of this decision.

Reasons for decision

Background

1. This is an appeal about Adult Disability Payment (“ADP”). ADP is a social security payment to adults who have a disability or long-term health condition that affects everyday life. The

conditions of entitlement are specified in the Disability Assistance for Working Age People (Scotland) Regulations 2022 (the “**2022 Regulations**”), made under the Social Security (Scotland) Act 2018 (the “**2018 Act**”). There are two components to an award of ADP, daily living and mobility components. Whether a claimant is entitled to ADP, and at what rate, depends on the number of points they score on activities set out in schedule 1 to the 2022 Regulations, assessed in accordance with other provisions in the main body of the 2022 Regulations. ADP may be awarded at standard or enhanced rates, at amounts set out in regulation 34 of the 2022 Regulations. The minimum number of points which has to be scored for an award of either component is 8 points. The enhanced rate (12 points or above for a component) is targeted towards disabled people with severe restrictions on daily living and mobility activities.

2. This appeal raises issues about procedure before the FTS when determining appeals about ADP, and in particular its inquisitorial function and powers to request further evidence. The appeal also raises issues about the conditions which must be met to qualify for ADP: the connection required between the condition suffered and limitations on claimants performing activities in schedule 1 to the 2022 Regulations; and the proper approach to scoring activities. The appeal has been conceded by Social Security Scotland (“**SSS**”). This decision sets out the reasons why the appeal is allowed.

Case history

3. The appellant (“**the claimant**”) made an online application for ADP on 29 August 2022. The condition she reported was “Anxious anxiety, PTSD, anxiety since teenager”. Later in the form she mentioned “being in a depressed state”. She stated that she did not require medication, had no treatments or therapies, and last saw her GP more than a year ago. She reported some issues with daily living activities 1, 7, 8, 9 and 10, and mobility activity 11, and no difficulties with other activities. Her partner provided a short statement in support referring to anxiety, PTSD, panic attacks and restricted function.
4. After receiving NB’s application, SSS contacted the claimant’s GP. SSS told the GP that the claimant had reported anxiety disorder and PTSD. The GP was requested to confirm these diagnoses, medications prescribed, and whether referrals had been made to specialists. The GP’s response was:

“Consulted with me in Sept 2022 reporting persistent problems with anxiety and low mood since her mother's death 2 years ago. [There was then reference to the circumstances of her mother’s death and a health condition suffered by her older sister]. Sleep is being affected as she wakes up worrying about everything. Trying to do some CBT herself but feeling overwhelmed. I signposted her to the local Mental Health Wellbeing Hub to get help with managing her anxiety. She declined any medication. I have not seen her since the initial consultation.”

5. On 12 December 2022, after considering the claim, SSS found that the claimant scored 6 points for daily living activities 1, 9 and 10, and 4 points for mobility activity 11. She scored insufficient points to qualify for an award of ADP.
6. The claimant requested a redetermination of her claim by SSS on 2 January 2023. Her application form for redetermination stated she was living with PTSD and anxiety disorder, and suggested points should have been scored for daily living activities 1, 2, 3, 7, 8, 9, and mobility activities 11 and 12.
7. After SSS received the redetermination request, it sought advice from a medical practitioner on 16 January 2023. Part of the advice given by that medical practitioner to SSS mentioned the option of making further contact with the claimant's GP to obtain medical records, or asking the claimant to obtain a patient summary from the GP. SSS asked the claimant to obtain a patient summary from her GP on 24 January 2023. The claimant said the information would be very limited, just some telephone conversations, and did not provide a patient summary. SSS also asked for further information from the claimant's partner about support he provided for her. He provided a statement about support he gave her "due to her anxiety depression PTSD and ADHD and OCD conditions". Screenshots of web pages for the mental wellbeing hub and self help pages were provided.
8. On redetermination on 15 February 2023, SSS again found the claimant did not qualify for an award. SSS's assessment, in the light of all of the information before it, was that the claimant scored 6 points for the daily living component (activities 1, 9 and 10) and 4 points for the mobility component (activity 11).
9. The claimant appealed to the FTS on the basis that the information provided should have been enough for the claim to be granted. She referred to the information obtained by SSS from her GP, the supporting statement from her partner, the screenshots of websites provided, and it was said that she had good days and bad days. SSS provided a submission for the FTS in response to the appeal. Even though there did not appear to be any new evidence available to SSS, its written submission to the FTS departed from its two previous decisions. SSS now submitted that NB qualified for both components of ADP, and both at the enhanced rate (daily living activities 1, 7, 8, 9, 10 and mobility activity 11).
10. The FTS determined the case on the papers. The claimant had stated she would prefer not to attend an oral hearing due to her anxiety. The FTS, after considering all of the evidence before it, refused the appeal by a decision dated 24 July 2023. It found the only points scored by the appellant were 2 points in respect of daily living activity 9 (engaging socially), so she did not qualify for an award of ADP. Permission to appeal was granted by the FTS.

11. On 24 August 2023 the Upper Tribunal for Scotland (“**UTS**”) made procedural orders for determination of the appeal, and set out the grounds of appeal on which the appeal would proceed. On 26 September 2023, a response was received from SSS conceding the appeal. The claimant provided a reply to that response in emails of 27 September 2023 and 31 October 2023.

Procedure to determine this appeal

12. Procedure before the UTS is governed by the UTS (Social Security Rules of Procedure) Regulations 2018 (the “**UTS Rules**”). Under rule 22, the 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.
13. In the procedural orders made by the UTS on 24 August 2023, a response from SSS to the appeal was invited, including views on whether a hearing was requested or not (paragraph 15). In its response SSS indicated it wished an oral hearing due to the range of issues raised in the appeal. Paragraph 16 of the procedural orders of 24 August 2023 invited the claimant to reply to the SSS’s response. The claimant in her emails in reply did not express any view about the form of hearing before the UTS.
14. It is just and fair to determine this appeal without an oral hearing before the UTS, taking into account the overriding objective in the UTS Rules and the view expressed. Both parties have been given an opportunity to make written submissions, on the merits of the appeal and the form of hearing, and SSS has conceded the appeal. There is sufficient information before the UTS to determine the appeal. The UTS is minded to allow the appeal on a basis that will include redetermination of the appellant’s claim before the FTS. Given that there will be a further consideration of the claim by the FTS, having regard to proportionality, and the avoidance of unnecessary formality and further delay (the claim having been made initially on 29 August 2022), it is appropriate to determine the appeal on the papers.

The FTS decision

15. The FTS provided a lengthy and carefully written decision, setting out the reasons why the appeal had been rejected. At the heart of the decision was the tribunal’s concern at the mismatch between the level of limitation claimed and the level of medical input. In paragraph 47 the FTS stated:
“If the appellant’s condition were so bad as she claimed, she would have extensive records with her GP. She produced no GP records or any letters from a consultant psychiatrist or clinical psychologist to indicate that she has a severe and enduring mental health diagnosis. There is no such diagnosis before the tribunal”.

16. The FTS correctly noted at paragraph 25 that the standard of proof for it in making findings of fact was the balance of probabilities. At paragraph 40 the FTS stated that it relied on the experience of its medical member in respect of the medical matters. The FTS found the claimant had failed to prove she had a medical condition giving rise to the need for assistance with the activities claimed, other than daily living activity 9(b).

Procedural grounds of appeal

Ground of appeal 1 – use of procedural powers by the FTS

17. The First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 (the “**FTS Rules**”) govern procedure before the FTS. Rule 2 contains the overriding objective of the FTS Rules, which is to enable the FTS to deal with cases fairly and justly. The FTS must seek to give effect to this overriding objective when it exercises any power under the rules or any rule or practice direction. Rule 2(1) gives a list of things included in dealing with a case fairly and justly. These include taking a proportionate approach to the case, ensuring so far as practicable that parties are able to participate fully in the proceedings and are treated with dignity and respect, and “using any special expertise of the FTS effectively”.
18. Rule 4 allows the FTS to regulate its own procedure. The FTS has wide procedural powers, including rule 4(3)(d), which allows it to “permit or require a party or another person to provide documents, information, evidence or submissions to the First-tier Tribunal or a party”. Rule 15 allows the FTS to give orders about issues on which it requires evidence of submissions, and rule 16 gives the FTS powers to require witnesses to attend or produce documents.
19. These provisions in the FTS Rules exist to assist the FTS in determining appeals before it. In many cases, documents already lodged with the FTS will be sufficient to enable it to determine the case fairly and justly. However, in other cases, it may be necessary for the FTS to consider exercising procedural powers available to it before determining the appeal. Those powers mean it can take an enabling and inquisitorial approach to appeals before it, to ensure they are disposed of fairly and justly.
20. In this particular case, there was a clear issue about the nature and extent of the claimant’s medical condition or conditions, and the extent to which any condition she suffered limited her function. The claimant, supported by her partner, had suggested at various times conditions of anxiety, depression, PTSD, OCD and ADHD. That list was not matched by the limited information available from the claimant’s GP. The claimant’s position as to her conditions and difficulties had also changed over time, with more conditions and limitations being mentioned as the procedure went on. The FTS noted at paragraph 38 there was no oral evidence from the claimant (repeated at paragraph 46 in relation to how often she experienced restrictions), and no further documentary evidence. It noted an absence of GP

records or any secondary care records to indicate she had a severe and enduring mental health diagnosis at paragraph 47, and an absence of an occupational therapy report in paragraph 45. The FTS found there was no justification in the papers for any award of ADP.

21. The nature and extent of the claimant's mental and physical conditions, and their effect on her functioning, were important to the FTS's decision. Given the gaps identified by the FTS in the information before it, the FTS erred by failing to consider whether it should exercise any of its procedural powers to obtain further evidence. It could, for example, have issued a direction stating that in order for the case to be determined justly and fairly, the FTS had decided that the claimant should be given the opportunity to (1) sign a mandate so the FTS could obtain her medical records from the GP (including any secondary care records) for the previous three years, and (2) attend an oral hearing to give evidence in person. Or it could have directed further written submissions from the claimant on points which were troubling it. There were a variety of orders it could have made.
22. It might be that, if the FTS had made further procedural orders, and no additional evidence was forthcoming to change the position on the papers before it, the tribunal would be entitled to come to the conclusion it did. As Baroness Hale stated in *Kerr v Department for Social Development* [2004] 1 WLR 1372 at paragraph 63:

“The first question will be whether each partner in the process had played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it”.

Further, the overriding objective of the FTS includes using special expertise effectively, including of a medical member. The FTS is entitled to use that expertise in evaluating and drawing inferences from the evidence before it (but not to the extent the medical member provides evidence which the claimant has had no opportunity to address; *Advocate General for Scotland, Petitioner* [2019] CSOH 79 at paragraph 243).

23. However, before the FTS refuses an appeal, it is important that parties are given a proper opportunity to participate. In this particular case, before determining the claim, the FTS should have considered exercising its inquisitorial powers and enabling further participation. In correspondence sent to the UTS forming the claimant's reply to SSS's submissions, the claimant stated she had not requested an oral hearing before the FTS because she thought the appeal would be allowed. This was due to a misunderstanding on her part of the respective roles of the FTS and the SSS. The FTS is not bound by submissions made by parties before it, and is required to make its own decision applying the governing law to the evidence before it. However, it is a reasonable inference from the claimant's submissions to the UTS that the claimant would have been open to attending an oral hearing if she had understood the FTS was looking at matters afresh and her attendance might make a difference. The claimant's

oral evidence, and additional medical evidence from GP records, might have resulted in a difference to the outcome. The FTS erred in law by failing to consider exercising its inquisitorial powers to recover further evidence and enable further participation. In these circumstances, the FTS decision must be quashed and the case remitted to the FTS for redetermination.

Substantive grounds of appeal

24. The appeal is allowed on the procedural grounds of appeal above, so there is no need to determine the substantive grounds. Nevertheless, in view of the widely different outcomes in scoring the claim so far, and the remit of the case to the FTS for redetermination, the following comments are offered to try to assist with redetermination.
25. Entitlement to ADP depends on a claimant satisfying conditions in the 2022 Regulations. Public money is a finite resource. ADP, as its name suggests, is targeted to people with disabilities who qualify under statutory tests. It is incumbent on those deciding on entitlement to apply all relevant provisions in the 2022 Regulations.

Ground of appeal 2.1 - Connection between conditions and limitation on ability to carry out activities

26. An important condition of entitlement is found in regulations 5 and 6 of the 2022 Regulations. There is only entitlement to components of ADP if “the individual’s ability to carry out...activities is limited [or severely limited] by the individual’s physical or mental condition or conditions” (regulations 5(2)(a), 5(3)(a), 6(2)(a) and 6(3)(a)). In other words, points are only scored if limitation on ability to carry out a particular activity is caused by a physical or mental condition or conditions, not some other reason. This is to ensure that ADP is appropriately targeted to people with disabilities, so they receive help with living and mobility costs.
27. Two examples demonstrate how the causal link required under regulations 5 and 6 might apply. A claimant might report that they cannot prepare and cook a simple meal (daily living activity 1). As a matter of fact, that might be true, but it does not follow that points are necessarily scored under daily living activity 1. If the reason for the limitation is the absence of cooking skills, because somebody else does the cooking, that would not of itself satisfy the statutory tests. The claimant must be suffering from a physical or mental condition or conditions which cause the limitation on preparing and cooking a simple meal. Another example could be a claimant with a condition such as irritable bowel syndrome who reports that they need assistance with budgeting (daily living activity 10). It may be the case that another family member in practice looks after family finances. But it would be unusual for a limitation on budgeting skills to be caused by IBS. In other words, even if issues have been

reported by the claimant on the application form, it may not be appropriate to award points for a particular activity.

28. In the present case, the evidence before the FTS disclosed a need to consider carefully whether there were limitations on carrying out particular activities, and if so whether they were due to physical or mental condition or conditions suffered by the claimant. The claimant's position had changed over time (see paragraphs 3, 6, 7 and 20 above). The limited information available from the GP differed from some of the information provided by the claimant, and evidence from a medical professional may carry more weight than self-diagnosis by a claimant or their partner. A further issue arose because the limitations reported went beyond what the FTS considered to be natural and probable consequences of the conditions supported by the GP.
29. It may be that some of these issues will be clarified when the FTS redetermines the claim, having made appropriate procedural orders. It is nevertheless worth saying that when the FTS makes its further decision, the approach it previously took of considering all of the conditions of entitlement to ADP is the correct one (paragraph 24 and the following paragraphs of the FTS decision). For points to be scored, there must be a causal link between the claimant's actual condition and limitations on function (paragraph 47 of the FTS decision, and paragraphs 26 and 27 above). The SSS, when deciding on entitlement, similarly has to take into account the provisions of regulations 5 and 6 of the 2022 Regulations.
30. Respect for the dignity of individuals is to be at the heart of the Scottish social security system, although breach of this principle does not of itself give rise to grounds for any legal action (section 1(d) and 2(3) of the 2018 Act). Both the FTS and UTS Rules have as part of the overriding objective ensuring that parties are treated with dignity and respect (rule 2(2)(c) and rule 2(3)(c) respectively), and both the FTS and UTS may take the principle into account. But treating a claimant with dignity and respect does not entail making awards of social security assistance to which they are not entitled under the governing legislation. There must be an evidential basis for an award of ADP, and the full terms of the 2022 Regulations should be applied when determining entitlement.

Ground of appeal 2.2 – errors in scoring

31. Finally, there is considerable detail in the 2022 Regulations about scoring. It may be of assistance with redetermination of this appeal (and determination of entitlement to ADP by the SSS) to draw particular attention to the following.
32. There are definitions in two interpretation provisions that have to be borne in mind – both in regulation 1 and in paragraph 1 of schedule 1 of the 2022 Regulations. The defined meaning of something in the activities in schedule 1 may not be intuitive, but it is that meaning that has to be applied. So for example, a claimant might think “complex written information”

within daily living activity 8 means something very complicated, and report difficulties when claiming ADP. However, under the 2022 Regulations, complex written information is defined as “more than one sentence of written or printed standard size text in the individual’s native language”. Only a small number of claimants are likely to have a difficulty with this. “Complex verbal information” for the purposes of daily living activity 7 is another example of a definition which may not be intuitive. There are many other examples where failure to appreciate the defined meaning of terms in the schedule to the 2022 Regulations may result in an incorrect decision about entitlement.

33. In this case, the claimant mentioned good days and bad days. Regulation 10 is relevant, and the detail of its provisions will have to be considered. In essence, for points to be scored, a descriptor has to be satisfied (within the meaning of the regulations) on over 50% of the days in the one year period known as the “required period” (regulations 11, 12 and schedule 1 paragraph 1). If function in relation to a particular activity is limited only on one or two days of the week, it is unlikely the 50% rule will be met. Further, if there appears to be more than one descriptor within an activity which might potentially apply, decision makers should bear in mind the provisions of regulation 10(1)(b) and (c), and also of regulation 7(2) that ability to carry out an activity is to be determined “on the basis of which descriptor applies for the individual to be able to carry out the activity” safely, to an acceptable standard, repeatedly and within a reasonable time period. This may guide them to the correct score to give the claimant.
34. Finally, the 2022 Regulations adopt the same framework for entitlement as used for personal independence payment, previously a UK wide benefit but replaced in Scotland by ADP after devolution of some social security benefits. Caselaw on the application of the Social Security (Personal Independence Payment) Regulations 2013 may provide guidance when considering similar concepts in the 2022 Regulations. The case of *SSWP v GJ* [2016] UKUT 8 (AAC) at paragraph 21 is likely to be of assistance to the FTS when considering daily living activities 7 and 9 in this case. The FTS may also find the case of *MH v SSWP* [2016] UKUT 531 (AAC) of assistance when considering mobility activities.

Conclusion

35. The FTS erred in law by acting with procedural impropriety, in that it failed to consider exercising its powers to call for further evidence. Its decision is quashed under section 47 of the Tribunals (Scotland) Act 2014. The UTS is not in a position to make the necessary findings in fact to determine the claimant’s ADP claim. The case is therefore remitted to the FTS for redetermination in accordance with the directions made below.
36. Finally, in the claimant’s emailed replies to the UTS, she referred to information she sent the UTS about medication and treatment. This information was not relevant to the proceedings before the UTS, which are not a rehearing of the claim but an appeal on a point of law. If the

claimant considers this information is relevant to her ADP claim, she should provide it to the FTS during the redetermination of her appeal.

Directions

1. The appeal should be redetermined by a freshly constituted FTS. The FTS should communicate with parties about the arrangements for redetermination.
2. The FTS should initially convene for a procedural hearing to consider whether it should exercise any of its procedural powers in relation to gathering further evidence, prior to holding a substantive hearing, having regard to paragraphs 17-23 above.
3. When redetermining the appeal, the FTS should bear in mind the observations in paragraphs 25-34 above. It should undertake a complete reconsideration of the issues raised in the appeal before it and the entitlement of the claimant to ADP pursuant to her application of 29 August 2022.

Lady Poole
7 November 2023

*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.*