



DECISION OF

Lady Poole

in the

APPEAL

in the case of

Social Security Scotland

Appellant

- and -

BM

Respondent

FTS Case reference: FTS/SSC/AE/23/01399

14 October 2024

DECISION

The appeal is allowed. The FTS erred materially in law in its decision of 4 June 2024 issued on 6 June 2024. Its decision is quashed. The case is remitted to the FTS for reconsideration, in accordance with the directions at the end of this decision.



REASONS FOR DECISION

Summary

1. This is an appeal about Adult Disability Payment (“ADP”). The decision in this appeal confirms two matters. First, points counting towards an award of ADP can only be scored if the claimant’s functional limitation is causally linked to a medical condition or conditions. Second, decisions about entitlement to ADP should specify whether an award is for a fixed or limited period.

Procedural background

2. On 3 February 2023 the respondent applied for ADP. His application was refused by Social Security Scotland (“SSS”), because he scored insufficient points under the provisions of the Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2022/54) (“**the ADP Regulations**”). The respondent requested a redetermination. As the redetermination was not made timeously, he appealed to the First-tier Tribunal for Scotland (“FTS”). The FTS, in its decision of 4 June 2024 and issued on 6 June 2024, found that the respondent was entitled to the daily living component of ADP, because he scored a total of 9 points, in respect of the activities of preparing food, managing therapy, washing and bathing, engaging socially and making budgeting decisions. The FTS found that the respondent was not entitled to the mobility component of ADP, because he scored only 4 points under mobility activity 2, which was insufficient for an award.
3. This appeal is brought by SSS against the decision of the FTS. Permission to appeal to the Upper Tribunal for Scotland (“UTS”) was granted on 22 June 2024 by the FTS on two grounds:
 - a. The FTS has erred in law by failing to make adequate findings of fact in support of its conclusions in respect of daily living activity 10, descriptor b.
 - b. The FTS erred in law by failing to specify whether the Respondent continues to be entitled to ADP for a fixed or indefinite period as required by regulation 37(3)(a) of the ADP Regulations.
4. SSS provided a full written submission with the grounds of appeal. Procedural orders were made by the UTS, affording the respondent an opportunity to provide answers to the points made by SSS, and to say whether a hearing was requested. The respondent elected not to respond, and did not request a hearing.
5. It is fair and just to determine this appeal without an oral hearing, although SSS requested a hearing. Both parties have been given an opportunity to provide written submissions, on the merits of the appeal and the form of hearing. 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 remit to the FTS. Given that there will be a further consideration of the claim by the FTS, having regard to proportionality as well as the avoidance of unnecessary formality and further delay, it is appropriate to determine the appeal on the papers.

Ground of appeal 1 - making budgeting decisions

6. 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".
7. The ADP Regulations made under the 2018 Act give effect to this provision by restricting eligibility to cases where inability to carry out specified daily living activities results from medical conditions (regulations 5 and 6). The standard wording is that entitlement only arises if:
 - "the individual's ability to carry out daily living [or mobility] activities is limited [or severely limited] by the individual's physical or mental condition or conditions".

So, for example, if the reason a person is unable to prepare food is because their spouse has always done it, so they don't know how to, and not because of a physical or mental impairment, no points will be scored on daily living activity 1 (*NB v SSS 2023 UT 35* at para 27). But if the reason for being unable to prepare food is that an arthritic condition results in significant impairment of hand function, they may score points towards the making of an award.
8. Although the descriptors in respect of daily living activity 10 (set out in Part 2 of Schedule 1 to the ADP Regulations) do not mention medical conditions, they must be read with regulation 5 of the ADP Regulations. Regulation 5 makes it clear that to score points the limitations on ability have to result from a medical condition or conditions. This links back to the wording in 2018 Act quoted above about "physical or mental impairment".
9. The reasons of the FTS for finding points to be scored under daily living activity 10 were in essence that the respondent was an undischarged bankrupt, and his partner operated the bank account, because the appellant was not permitted to do so because of being an



undischarged bankrupt (para 28). Those facts did not support the award of points for the daily living activity of budgeting. The FTS accepted the claimant suffered from some medical conditions. But it is not an obvious inference from osteoarthritis in the hips that a person is unable to budget. Nor is it a necessary inference from a diagnosis of depression or other mental health issues that a person has limited budgeting skills. That is so particularly given the FTS's factual findings that the respondent had no difficulty in dealing with numbers or measurements and did not have any difficulty in doing his work as a joiner (para 25). The FTS also found that he took medication, which may have alleviated the symptoms of depression (para 8).

10. The error of law of the FTS was material because its award of points for managing budgeting decisions took the respondent over the threshold 8 points, so that he became entitled to ADP. The decision must be quashed and remitted to the FTS for redetermination.

Ground of appeal 2 – period of eligibility

11. In the second ground of appeal, it is argued the FTS erred in law by failing to specify whether the entitlement to ADP was for a fixed or indefinite period.
12. Regulation 37 of the ADP Regulations provides:
 - “(1) Subject to paragraphs (3) and (4), a determination that an individual is entitled to ADP in respect of a period is to be made on the basis that the individual has an ongoing entitlement to ADP after the end of that period, except where paragraph (2) applies.
 - (2) This paragraph applies where, after the end of the period mentioned in paragraph (1), the individual no longer satisfies the eligibility rules.
 - (3) A determination of ongoing entitlement is made on the basis that—
 - (a) the individual will continue to be **entitled to ADP for a fixed or indefinite period as specified in the notice of determination**, and
 - (b) the decision that the individual is entitled to ADP for each subsequent 4-week period is to be taken in accordance with these Regulations, on the strength of the assumptions set out in paragraph (4).
 - (4) The assumptions are that—
 - (a) the individual continues to satisfy the eligibility criteria which were satisfied to be entitled to Adult Disability Payment under the determination mentioned in paragraph (1),
 - (b) the information on which the determination mentioned in paragraph (1) was made still applies and is relevant in the individual's case, and
 - (c) there is no change in circumstances of the individual which would require to be notified under section 56 (duty to notify change of circumstances) of the 2018 Act”.



13. Regulation 37 reduces the need for entitlement to ADP to be revisited, in cases where a person has been found entitled to ADP on the basis of limitations resulting from medical conditions that are unlikely to change. If a person is given an indefinite award, it will ordinarily continue unless SSS becomes aware that something has altered.
14. However, as explained in *Social Security Scotland v FK* 2024 UT 23, ADP is targeted towards people with significant impairments, to ensure that finite public funds are targeted where the legislature considers they are most needed (paras 1 and 16). Some medical conditions, for example some mental health conditions, may respond to treatment or changing circumstances, and get better. Or they may worsen, with the result that enhanced rather than standard awards may be justified. In cases where the effects of conditions may change, it may be appropriate to review continuing entitlement.
15. Regulation 37(3)(a) requires a notice of determination to specify whether entitlement is for a fixed or indefinite period, so that applicants and SSS know whether an award is to be reviewed or not. Accordingly, where entitlement is determined, whether that be by SSS or the FTS, a decision notice should set out whether the award is for a fixed or indefinite period, and if a fixed period, when that expires.
16. The FTS failed to state whether the award was for a fixed or indefinite period. This was an error of law because the FTS did not give effect to regulation 37(3)(a) of the ADP Regulations.

Conclusion

17. The grounds of appeal are well founded. Under section 47 of the Tribunals (Scotland) Act 2014, the decision of the FTS is quashed. It is appropriate to remit to the FTS because further findings in fact are necessary to determine the respondent's entitlement to ADP and the period for which any award should be made.

Directions

1. The case should be reheard by a differently constituted tribunal.
2. At the rehearing of the case, the FTS need consider only matters in dispute between the parties.
3. The FTS should in particular make relevant findings in fact, and a decision based on those findings, as to whether the respondent scores points under daily living activity 10, having regard to what is said between paragraphs 6 and 10 above.
4. If the respondent scores sufficient points for an award of ADP, the FTS should state whether the award is for a fixed or indefinite period, having regard to what is said between paragraphs 11 to 16 above.



Lady Poole

*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.*