IN THE UPPER TRIBUNAL **Appeal No: CE/2665/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of the Secretary of State.

The decision of the First-tier Tribunal sitting at Milton Keynes on 31 May 2017 under reference SC043/17/00084 involved an error on a material point of law and is set aside.

The Upper Tribunal is not able to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007

DIRECTIONS

Subject to any later Directions by a District Tribunal Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

(1) The new hearing will be at an oral hearing.

(2) The claimant is reminded that the tribunal can only deal with his situation as it was down to 22 October 2016 and not any changes after that date.

(3) If either party has any further evidence that they wish to put before the tribunal which is relevant to the claimant's health conditions or their effects on his functioning as at 22 October 2016, this should be sent to the First-tier Tribunal's office in Birmingham within one month of this decision being notified to the parties.

(4) The First-tier Tribunal is directed to follow the law as set out below.

Appearances: Julia Smyth of counsel represented the appellant Secretary of State for Work and Pensions.

Jennifer McLeod of counsel represented the respondent claimant.

REASONS FOR DECISION

Introduction

1. The key issue on this appeal is the scope of descriptor 5(c) in Schedule 2 to the Employment and Support Allowance Regulations 2008 ("the ESA Regs"). That descriptor falls under the activity "Manual dexterity" and is concerned with whether a claimant "Cannot use a pen or pencil to make a meaningful mark with either hand". It attracts an award of nine points if met. The First-tier Tribunal which decided this appeal on 31 May 2017 ("the tribunal") decided that the claimant, who is the respondent to this appeal, met descriptor 5(c).

2. A subsidiary issue on the appeal concerns the adequacy of the tribunal's approach to activity 1 in the same Schedule 2. Activity 1 concerns mobilising.

3. I am satisfied that the tribunal erred in law on both issues and that as a result its decision needs to be set aside and the appeal remitted to a completely new First-tier Tribunal to be decided entirely afresh.

Preliminary point

4. The claimant raised objection before me to the Secretary of State's skeleton argument for the hearing being lodged late. He also raised concerns that he had not been provided with an opportunity to object to the extension of time the Secretary of State had sought, and was granted, to lodge her skeleton argument. I apologise for any oversight that may have occurred in not notifying the claimant of the Secretary of State's request for the first extension of time and its grant.

5. If the Secretary of State wished to rely on any skeleton argument at the hearing before me it was to have been lodged by 16 July 2018. The Secretary of State sought her first extension of time for lodging, if necessary, her skeleton argument by email on 12 July 2018, in which she asked for time to be extended by two days until 18 July 2018. The extra time was to enable the Secretary of State to consider whether she wished to rely on a skeleton argument and then, if she wished to do so, to file that argument. I granted that extension on 13 July 2018. Neither the request for the extension nor my grant of it were notified to the claimant or any of his representatives. That was an oversight. The short turnaround time may, in part, have contributed to this. In addition, at this stage, as far as I can identify, the Upper Tribunal did not have an email contact for the claimant or his representative at the CAB. A short response time for raising any objections may therefore have been unlikely to have been met before 16 or 18 July 2018.

6. The Secretary of State did not in fact provide any skeleton argument until the afternoon of 24 July 2018, and it was only at that time that she retrospectively sought a further extension of time until that date. This request for the further extension of time, and the skeleton argument, **was** notified to the claimant through his representatives by the Upper Tribunal the following morning. This was normal procedure in a case where the Upper Tribunal held the contact details for the claimant's representative(s). The parties were notified by the Upper Tribunal by email on 25 July 2018 that whether time ought to be extended to admit the Secretary of State's late skeleton argument would be addressed at the outset of the hearing before me.

7. I granted the extension of time to admit the Secretary of State's skeleton argument at the hearing. Ms McLeod, for the claimant, in the end did not press her objections to the skeleton argument being admitted with any great force. She realised, realistically in my view, that little would be achieved by the Upper Tribunal refusing to admit it as that could not, in an inquisitorial jurisdiction concerned ultimately

with what the claimant's correct benefit entitlement should be (see *Gillies v SSWP* [2006] UKHL 2; [2006] 1 W.L.R. 781 (*R(DLA) 5/06*) at paragraph [41]), prevent Ms Smyth, for the Secretary of State, from reading it out to the Upper Tribunal at the hearing or otherwise relying on the arguments in it by way of oral submissions. Moreover, Ms McLeod accepted that the clamant had not been prejudiced by the late service of the skeleton argument. Nor did he need more time to respond to it. If needed, written submissions could be allowed on any new points (no such further written submissions were needed). I note, further (see immediately below), that the Secretary of State's skeleton argument and Ms Smyth's development of it in her oral submissions assisted the claimant on the mobilising issue.

8. However, I should not leave this issue without emphasising the importance of the Secretary of State, and other professional representatives, meeting **in time** the directions of the Upper Tribunal about providing skeleton arguments (if such are to be provided). Oral hearings of appeals before the Upper Tribunal do not occur that frequently and when they do they quite often concern issues of law on which guidance may be required. It does not assist in this process if skeleton arguments that are to be provided are provided late, which regrettably is not that uncommon. I take this opportunity to remind all parties, but particularly the Secretary of State, of what the Tribunal of Commissioners said about this issue in *R(IS)2/08* (at paragraphs [56] to [60]). (I should make it clear that I am not suggesting that all the same faults referred to in *R(IS)2/08* applied in this appeal.):

> "**Late skeleton arguments**
> 56. Finally, we wish to record our disapproval of the Secretary of State's representatives' cavalier attitude to the Chief Commissioner's direction to file a skeleton argument not less than fourteen days before the oral hearing in this case.
> 57. The point of directing that a skeleton argument is submitted before the day of a hearing is not just to ensure that the Commissioners have the document at the hearing. It is primarily to ensure that the opposing party and the Commissioners are able properly to prepare for the hearing. In this jurisdiction, where Commissioners may well wish to consider points not raised by the

> parties, it is particularly important that they have the skeleton arguments in good time.
> 58. Here, the Chief Commissioner's direction was given when he directed that the case be heard by a Tribunal of Commissioners, three and a half months before the hearing. We were told at the hearing that the reason that the skeleton argument was delivered late was that a major policy meeting had had to be convened and that the meeting had had to be held on a date after the skeleton argument was due because relevant people had been away over the summer. The skeleton argument was eventually delivered to the Commissioners' Office by email two days before the hearing, with an apology and a request for an extension of time. There was no explanation for its lateness, which betrays an assumption that an extension of time would be granted without any questions being asked. The Commissioners' Office had previously made enquiries about the skeleton argument and had been told simply that it was not possible to produce it any earlier. No request had been made then for an extension of time for filing the skeleton argument or for a postponement of the hearing. Unsurprisingly, Mr Gibson was unable to assimilate the contents of the skeleton argument at the hearing, even though we rose for some time while he read it. The result was that we were obliged to give him an opportunity to make further written submissions after the hearing. We observe that not only members of this Tribunal of Commissioners but also other Commissioners have had recent experience of the late submission of skeleton arguments.
> 59. It was particularly unsatisfactory that the skeleton argument was delivered late in the present case because the Secretary of State had known both that he might be taking a radically different approach to the case from that taken in his previous submissions and that the claimant's representative was neither a lawyer nor experienced in social security matters.
> 60. In future, if it becomes apparent that there will be difficulty in meeting a deadline for filing a skeleton argument, a formal application for an extension of time should be made before the deadline has expired and it should be accompanied by an explanation for the expected delay. This applies to claimants' representatives as well as the Secretary of State's."

Mobilising

9. I will take this issue first to clear it out of the way. Both parties now agree that the tribunal erred materially in law:

(a) in not addressing the GP's evidence about the claimant's walking being limited to 50 metres (page 31), and

(b) in failing adequately to consider the Personal Independence Payment award made to the claimant from August 2016 based on his only being able to "stand and then move" (in effect 'walk') between 20 and 50 metres (see appeal on page 27 and written submission to the tribunal on pages 116-117).

10. Following Upper Tribunal authority such as *JB v SSWP* (ESA) [2017] UKUT 0020 (AAC), the Secretary of State now accepts that the tribunal's failure to turn its mind to the PIP award and, more importantly, the evidence underlying it amounted to a material error of law. The decision under appeal to the tribunal in this case was dated 22 October 2016 and the PIP award the claimant referred to in his appeal was said by him to take effect from August 2016. An assessment of being limited to 'walking' less than 50 metres under the PIP scheme only two months before the date of the decision in this appeal may have indicated there was relevant evidence available on this appeal that ought to have been supplied to the tribunal. Moreover, the claimant had twice emphasised the importance of this evidence, which on its face was arguably inconsistent with the assessment the Secretary of State had made of the claimant's ability to mobilise for employment and support allowance purposes. In all these circumstances, I agree that the tribunal erred in law in not addressing this PIP evidence at all.

11. In my judgment it also erred in law in failing to address the GP's evidence, in the GP's letter of 5 November 2016, that "[The claimant] cannot walk more than 50m on level ground unaided without stopping as he gets discomfort in leg and gets exhausted". Given that the tribunal did refer to the same letter and seemingly[1] accepted its evidence about the claimant not being able to hold a pen or pencil properly and not being able to make a meaningful mark, in my judgment it was incumbent on the tribunal to clearly consider and address in its reasoning the GP's evidence in that letter about the claimant's walking ability. Put somewhat crudely, if the GP's evidence was sound on manual dexterity why was it not also of cogency on mobilising?

[1] The GP's letter is addressed under a sub-heading titled 'The oral hearing'. The tribunal here wrote in terms of the GP's letter being "very helpful" and set out the actual evidence in that letter concerning manual dexterity, but it reduced the mobilising evidence in the letter to a more equivocal and less accurate "reduced mobility". The tribunal in this section of its reasoning also stated that its assessment was "entirely consistent" with what the GP had written in the letter of 5 November 2016. If the tribunal was not relying on the GP's letter for the purposes of its decision on descriptor 5(c) then it is unclear what it was doing in this section of its reasoning, and that failure of explanation itself amounts to a material error of law.

12. I should add that even assuming, just for the purposes of considering the tribunal's approach to mobilising, that the tribunal had been correct to award the claimant nine points for descriptor 5(c) (and another six points for descriptor 4(c), which was not in issue before me), the above error in its approach to the evidence concerning the claimant's ability to mobilise was still material to the decision arrived at. This is because being limited to mobilising for 50 metres or less would have meant the claimant also satisfied Schedule 3 to the ESA Regs. It thus would have brought the claimant, and could still bring him, the additional benefit of qualifying for the support group of the employment and support allowance.

13. It was therefore to the claimant's advantage that the Secretary of State was allowed to make this argument in full.

14. I should add that I do not consider there was any bar to this error of law argument being made on this appeal. Even if the Secretary of State only sought, and the First-tier Tribunal only granted her, permission to appeal on the scope of descriptor 5(c), there is no good reason why I ought not to extend time to enable this mobilising ground also to be taken. The factors in favour of extending time would be the strength of the ground, the Secretary of State positively being in favour of it being taken and there being no substantive objection from the claimant to it being taken. Indeed, on this last point it should be noted that it was the clamant who had first sought to introduce an alternative or additional argument before the Upper Tribunal based on mobilising.

Cannot make meaningful mark with either hand

15. There are two Upper Tribunal decisions on descriptor 5(c). They are *SM v SSWP* [2015] UKUT 617 (AAC) and *SSWP v LH* [2017] UKUT 475 (AAC). I need only quote from the latter as it addresses for my purposes all the material aspects of the decision in *SM*. The critical parts of *LH* are in paragraphs 10 to 15, where Upper Tribunal Judge Jacobs said the following, all of which I agree with and endorse.

"Activity 5(c)

10. It may assist the First-tier Tribunal at the rehearing if I give some guidance on the scope of this descriptor.

11. The **Training & Development - Revised WCA Handbook**, in the version dated 9 February 2015 version, says:

> **Scope**
>
> This activity relates to hand and wrist function. It is intended to reflect the level of ability to manipulate objects that a person would need in order to carry out work-related tasks. Ability to use a pen or pencil is intended to reflect the ability to use a pen or pencil in order to make a purposeful mark such as a cross or a tick. It does not reflect a person's level of literacy.

That, of course, is guidance, not law, and it is not binding on the First-tier Tribunal. However, following the approach I take to the scope of the descriptor produces the same result as that set out in the **WCA Handbook**.

12. In *SM v Secretary of State for Work and Pensions* [2015] UKUT 617 (AAC), Upper Tribunal Judge Ward said this – I have corrected an obvious typo:

> 7. It follows that I have received only brief submissions from the parties about descriptor 5 (c). The tribunal found as fact that the claimant could write his signature. It certainly is an issue before me (I am not clear whether it was before the First-tier Tribunal) whether he can do so with reasonable regularity but that is something for the tribunal to which this case is remitted to explore. The claimant's representative draws attention to various definitions of 'meaningful'. In my view descriptor 5(c) is not concerned with marks that are 'meaningful' in the sense of 'having great meaning, eloquent, expressive' (per Collins dictionary). That is a sense which might be appropriate when 'meaningful' is applied to, for instance, glances, but is not a natural sense when applied to something such as rudimentary as a mark with a pen or pencil. Rather, I consider that it in this context means 'having meaning' as opposed to 'not having meaning'. Further than that I prefer not to go in this case.

I agree.

13. The key to understanding and applying the employment and support allowance activities and their descriptors is to identify the function that they are testing. In the case of activity 5, it is manual dexterity. In other words, it is the claimant's ability to use their fingers, hands and (to some extent, at least) wrists. In the case of descriptor (c), it is a measure of the claimant's ability to hold and control a pen or pencil. It is in Part 1 of Schedule 2, so it is limited to physical disabilities arising from a *specific bodily disease or disablement* (regulation 19(5)(a)).

> 14. The mark has to be meaningful, so it must be capable of conveying some meaning and, inevitably, be a mark that is directed in the sense of the claimant having a meaning in mind. But that does not make the descriptor a test of intellectual capacity, which is the exclusive province of Part 2 of the Schedule (regulation 19(5)(b)). The level of the claimant's literacy is not in issue. This is a test of physical function, whereas literacy is a mental matter. And the test is limited to the claimant's fingers, hands and wrists, which are not related to literacy.
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> 15. I agree with Judge Ward in *SM* that descriptor 5(c) is not concerned with the content of what is written. The only issue is whether it is meaningful. It has to be capable of conveying meaning. Random doodling or scribbling is not sufficient. It is not, though, necessary to convey any particular meaning. None is specified, so any meaning will do. It might be in the form of words, like a person's name or signature. Or it might be in the form of some symbol, such as a tick that could indicate agreement on a form or a cross that could indicate a vote at an election."

16. Ignoring the GP's letter addressed in paragraph 11 above, the tribunal dealt with why it had concluded that the claimant met descriptor 5(c) in its reasons as follows. (The claimant was the appellant before it.)

> "Manual dexterity
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> 21. The appellant claimed difficulty with manual dexterity and he stated that he was right handed and he was using his left hand to write.
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> 22. The Tribunal noted that he had not completed the claim form himself and he was holding the walking stick in his left hand. He was asked by the presenting officer if he had signed the claim form and he confirmed that he had. He described difficulty with managing buttons which he said took him time and he tried to do it. He was not cooking.
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> 23. The presenting officer stated that the signature amounted to a meaningful mark and the description he gave about his right and left hand function demonstrated not only reduced hand function but very reduced hand function.
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> 24. The Tribunal's view was that where an appellant had effectively adopted a monkey grip to use a pen to mark his signature that was because his right hand grip was poor. If someone looked at his signature on page 52 they would not recognise it as a signature. It was a mark but the Tribunals' view was that it was not a meaningful mark. That reflected his right sided weakness. The Tribunal was satisfied that descriptor 5c applied."

17. I do not wish to add unnecessarily to what has been said about descriptor 5(c) in *SM* and *LH*. However, some points of emphasis are required given the focus of the arguments on this appeal.

18. First, the language of the test requires consideration to be given to the person's ability to use both the right and the left hand. If the person can make a meaningful mark with one hand but not the other hand. or can do so with each hand, then he or she will not meet descriptor 5(c). (I have deliberately avoided the use of "both hands" here given the possible connotation of such usage that what is required is the use of the right and left hands at the same time.) That it seems to me is the obvious and logical result of the statutory language of "Cannot….with either hand"; the opposite of which is that the person can carry out the function with at least one hand.

19. Second, as *LH* in particular makes plain, the test is not whether the person can write a word or a sentence with either hand. The test of not being able to make a meaningful mark with either hand is therefore more difficult for a claimant to satisfy than the old test in descriptor 5(d) in the Schedule to the Social Security (Incapacity for Work) (General) Regulations 1995, where the test of "cannot use a pen or pencil" was interpreted as meaning "that the claimant scores the points if he is physically unable to use a pen or pencil to write in a normal manner" (*CIB/13161/1996* and *CIB/13506/1996* at paragraph 38 – my underlining added for emphasis).

20. Third, and building on the first two points, the use of the word "Cannot" in the descriptor requires attention to be given to a claimant's functional ability to make a meaningful mark with either hand across a range of potential situations. This is because if the claimant **can** make a meaningful mark with one hand then the descriptor is not satisfied.

21. The tribunal was therefore wrong in this case to focus solely on the claimant's ability to make the mark he did in the signature box on the 'Declaration' section of the ESA50 form (page 52). (He did the same in

the signature box on the appeal form on page 30, though the mark there was different). I leave it to be decided again on the facts, if it is necessary to do so, whether the mark in either signature box constituted a meaningful mark. The parties were divided before me on this issue. The Secretary of State put emphasis on the 'mark' part of the statutory wording and argued, correctly, that there was no need for the claimant to be able to write out his name. The claimant, on the other hand, stressed the 'meaningful' part of the statutory test and argued that the mark the claimant made in the signature box(es) was not capable of conveying any meaning as a signature and amounted to no more than the 'random doodling or scribbling' referred to in *LH*.

22. I can see the force in the claimant's argument on the evidence before me. But even in the context of considering the ESA50 signature box alone, and I emphasise that the focus ought not to have ended on that one instance of marking a mark (unless it had then been carefully reasoned out why that one example provided a sound evidence base for establishing that the claimant could not make any meaningful mark with either hand, which did not occur here), its meaningfulness may depend on other contextual factors. For example, the written mark that the claimant usually used to convey his signature.

23. There is, however, a further difficulty with the tribunal's fact-finding and reasoning. This is that it leaves it unclear, even in the context of the ESA50 'signature' alone, whether the tribunal considered the claimant's ability to make a meaningful mark with his right hand and, then, his left hand. The relevant context was that the claimant had sadly suffered a stroke in January 2016 and as a result had weakness all down his right side. He had said in the ESA 50 form that he was naturally right-handed and the stoke had affected, amongst other things, his ability to write. The health care professional under "Description of a Typical Day" in the ESA85 form had recorded the claimant as stating the following: "He learns how to write with left hand and he is able to make a signature and write his name with his left hand". This was disputed by the claimant in his appeal but neither the appeal nor the GP's letter which

accompanied it expressly stated whether the mark in the signature box in the ESA50 form had been made by the claimant using his left or his right hand. The prior mandatory reconsideration request made by the claimant had simply stated that he was unable to use a pen or pencil to make a meaningful mark with either hand.

24. The claimant's case on this point to the tribunal was made clearer in the written submission he provided to the tribunal, though not necessarily on the issue of which hand he had used to make the mark in the signature box on the ESA50 form. The written submissions referred to descriptor 5(c) and noted the medical evidence setting out the claimant's very limited function in his right hand to the extent that he had difficultly holding onto a pen and his GP had remarked, again seemingly in the context of the right hand, that the claimant's hand grip was still poor and he could not hold a pen properly or make a meaningful mark. The submission went on "Because I am right handed I have had to learn how to do things with my left hand. I accept that I have managed to some extent to function with my left hand.....However I have not been able to learn how to write or make a meaningful mark". This implies that the mark in the signature box on the ESA50 form was made by the claimant using his left hand, and this would appear to have been confirmed or clarified by the claimant in his evidence to the tribunal where it is recorded "signature [ESA50 form][?] I used the left – not normal signature".

25. Given this evidence, it is unclear why the tribunal's reasoning in paragraph 24 referred only to the adoption of a monkey grip to mark the claimant's signature because his <u>right</u> hand grip was poor? By this did the tribunal mean that because the right hand effectively did not function the claimant was using a monkey grip with his *left* hand to mark his signature? Or did it mean that in reasoning out its decision on the evidence the tribunal focused solely, and wrongly, on the claimant's ability to make a meaningful mark with his right hand? The former may seem more likely in the context of the evidence before the

tribunal. However, the latter becomes a greater possibility when the later language in paragraph 24 - of the 'signature' on the ESA50 form reflecting the claimant's right sided weakness - is taken into account. This confusion in the reasoning, and the lack of fact-finding as to the relevant functioning in the right hand and the left hand, also renders the tribunal's decision materially in error of law.

26. However, for reasons I have already touched on, I consider the most critical error in the tribunal's approach to descriptor 5(c) was its failure to consider in the round and across a number of potential or actual situations whether the claimant was unable with his right hand or his left hand to make a meaningful mark with a pen or pencil. For example, could he make the mark of a tick or a cross with either his right or his left hand on a census form or an election card? If he could, even if it was only with one hand, it is not apparent on what basis it could be concluded that he could not make a meaningful mark with either hand. In other words, the tribunal wrongly focused solely on the mark made by the claimant in the signature box on the ESA50 form (and even there did not acquit itself properly).

27. I therefore reject the claimant's argument that the tribunal was entitled to enquire further into the claimant's ability to use a pen or pencil but was not required to do so. I likewise reject the argument made on his behalf that the tribunal was entitled to be satisfied on the basis of evidence it considered that he could not make a meaningful mark with a pen or pencil with either hand and was not obliged to consider other marks he could potentially make. Both submissions ignore the inquisitorial function of the tribunal in deciding entitlement to benefit on the issues raised before it. The issue on the appeal here was whether the claimant satisfied descriptor 5(c) and that required entailed the tribunal to satisfy itself whether he could not make a meaningful mark with a pen or pencil with either hand. If the claimant could make a meaningful mark with one hand then the descriptor was not satisfied (as his counsel before me accepted). But that in my judgment required the tribunal either to reason from the one piece of evidence it did have,

the 'signature', to a general conclusion as to the claimant's ability to make a meaningful mark with either hand, or for it to have considered other relevant instances of pen or pencil use with each hand. It failed to do either and thereby erred in law.

Overall conclusion

28. For the reasons set out above, the tribunal's decision of 31 May 2017 must be set aside. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided by a completely differently constituted First-tier Tribunal (Social Entitlement Chamber), at a hearing.

29. The Secretary of State's success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether the claimant's appeal will succeed on the **facts** before the new First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law as set out above and once it has properly considered all the relevant evidence.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 21st November 2018