Case No: CSPIP/341/2018

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The appeal against the decision of the First-tier Tribunal given at Glasgow on 23 May 2018 is refused. It is dismissed.

REASONS FOR DECISION

1. The claimant appealed against the decision of the tribunal which was to the effect that the claimant is not entitled to any rate of the daily living component nor any rate of the mobility component of personal independence payment.

2. The grounds of appeal are within short compass. They are as follows:

> "I refer to the decision of the tribunal in this case and request set aside/leave to appeal on the grounds that the tribunal have erred in law by failing to give adequate reasons for decision in relation to the risks arising from blackouts.
>
> At para 7 the tribunal state that they do not believe that my client has blackouts. Although the tribunal did ask questions in relation to blackouts they at no time put it to my client that they did not believe she suffered from blackouts and this was a breach of the rules of natural justice as there was no indication that the case might actually proceed on this basis. The tribunal have ignored the fact that the HCP report which they accepted as the basis of their decision did in fact accept the blackouts as did the decision maker and it is explicit in the reasoning of the HCP that the reason for the refusal of points was because the blackouts did not occur on the majority of days NOT that they did not exist. The tribunal should have made it clear that they were going to proceed on an entirely different way from the submission made by the Sec. of State. The claimant is entitled to know the case that they are going to meet."

3. The Secretary of State has supported the claimant's appeal. In a submission, it is said:

> "6. The appellants representative at page 191 has stated that at paragraph 7 of the Tribunals statement of reasons on page 196 it says that the Tribunal do not believe that their client has blackouts; although the Tribunal did ask questions in relation to blackouts, they at no time put it to their client that they did not believe she suffered from blackouts.
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> 7. Looking then at paragraph 7 the Tribunal states that they conclude the appellant did not suffer from blackouts, going on to then explain that this was because there was no mention of any such incidents at documents 86/87 and because there has been no treatments or investigations into the condition until it was raised at appeal. Paragraph 6 of the statement of reasons states:- *'The presentation and content of the appellant's appeal were subject to certain inconsistencies, improbabilities and evasiveness such that the tribunal found it could not make reliable findings in fact upon matters stated by the appellant which were not supported by other, more credible, evidence.'*
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> 8. This matter had previously been adjourned in order to obtain further evidence. At page 83 of the record of proceedings dated 14/3/18 there is a handwritten note:- *'The Tribunal considered it was necessary to obtain further information in relation to the appellant's blackouts which she stated affected her once or twice per week.'* The adjournment notice on page 84 does not mention obtaining evidence regarding blackouts, but states at paragraph 3(ii) of the directions:- *'In addition it is requested that the appellants GP send to HMCTS any secondary correspondence in relation to the appellants suspected stroke 2014.'*
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> 9. As there was a lack of medical evidence in relation to the blackouts, the Tribunal had a duty to enquire and find out as much information as possible from the witness when she was giving evidence. In the statement of reasons, the Tribunal concluded that the appellant did not suffer from any relevant occasions of blackouts. They go on to say that they concluded that these references to blackouts were probably references to hypos at about the time of the 2008 claim pack. Looking at the HP report at page 42 it says that the

appellant suffers blackouts every few weeks, current treatment – None, but she does discuss it with her GP on a regular basis.

10. In the Tribunal Practice and Procedure, Tribunals under the Tribunals, Courts and Enforcement Act 2007 4th Edition, Judge Edward Jacobs offers guidance on what to do with a witness who is a suspected liar. It is stated at page 412 paragraph 10.126 – 'A Judge who suspects or believes that a witness is deliberately lying must give the witness a chance to deal with that concern.' He goes on to say – 'If after this testing the Judge remains of the view that the witness may be deliberately lying, this should be put to the witness with reasons.'

11. The FtT did not seem to explore this, the witness not having the opportunity to dispel any assumptions that may have arisen during her questioning. The tribunal did not address the fact that it was stated that the blackouts were discussed with the GP and may have adjourned to obtain further information or evidence in relation to this, by asking the GP to provide a statement, as mentioned the adjournment notice did not mention requesting information about the blackouts from the GP.

12. The interpretation of witness credibility and observations made during a hearing was explored by Judge Jacobs in the case of CDLA/145/2006 at paragraph 11:-

> *'11. And as I said, less eloquently, in CDLA/4585/1997 at paragraph 17:*
>
> *"However, law is one thing; practice is another. It is always good practice at the end of a hearing to put to a claimant for comment any impression that may have been formed as a result of observations made during the hearing, so that the claimant may have a chance to comment.""*
>
> *and paragraph 13:-*
>
> *'13.Tribunals have an inquisitorial function and may fail to comply with that function if they neglect to make appropriate inquiries in the light of any observation made during the hearing. Tribunals must also ensure that the parties have a fair hearing and the failure to allow a claimant to comment on observations may be a violation of that duty, as in CDLA/440/1995 (cited by the Secretary of State).'*

The claimant responded to that submission as follows:

> "I agree with S of S and consent to decisions without reasons."

4. It is apparent that the decision maker accepted that the claimant suffered from blackouts. In the decision which awarded her no points the decision maker said:

> "Your blackouts occur every couple of weeks, which is not for the majority of the time."

The Health Care Professional who prepared the report in the history of the claimant's condition noted:

> "Blackouts since 1992
>
> | | | |
> |---|---|---|
> | Current symptoms | - | She suffers blackouts every few weeks. She can feel strange for a few seconds and then collapses. She is usually unconscious for a few minutes, before waking. |
> | Current treatment | - | None, but she does discuss it with her GP on a regular basis. |

The professional also made reference to this in a passage under the heading "variability" at page 45. However, it is apparent from the report that the Health Care Professional had doubts about the history given to him. For example in expressing the opinion that in relation to activity 1, preparing food, he chose the descriptor "a" which is in the following terms: "can prepare and cook a simple meal unaided". In justifying that opinion he said:

> "Reported blackouts are not the majority of days and she has no related specialist input or medication, with is medically inconsistent with reported frequency."

In respect of activity 4 he says: "Reported blackouts are not for the majority in days"
And the same in relation to Activity 9, Activity 11 and Activity 12.

5. In paragraph 5 of the statement the tribunal made it clear that it did not accept the reasoning of the Health Care Professional and the decision maker in respect of their respective opinions in relation to activities covered by blackouts. In the event, it made no difference to the point scoring descriptors in issue because the tribunal did not accept that

the claimant suffered from blackouts. It is apparent from paragraph 6 that the tribunal did not find her to be a credible or a reliable witness and set out supportable reasons for this view. It went on to say in paragraph 7:

> "7. In particular, the tribunal concluded that the appellant did not suffer from any relevant occasions of blackouts. This was because there was no mention of any such incidents at docs 86/87 and because there was no treatment, specialist or otherwise, in place for such a condition and because, from the appellant's own evidence, there had been no investigations into such a condition until the matter had been raised by the appellant in connection with the appeal. Although there was a considerable amount of information available in the appellant's medical records, there was no material reference to a condition or relevant risk of blackouts. Although there was reference to blackouts at docs 153 and 175 in a claim pack submitted in 2008 there was no reference to any relevant condition at doc 134 or to any relevant medication or treatment or investigation and, taking into account the appellant's oral evidence that she had suffered 2 diabetic hypos in 14 years, tribunal concluded that these references to blackouts were probably references to hypos at about the time of the 2008 claim pack."

It is apparent from paragraphs 5, 6 and 7 that the tribunal were aware of the fact that the Health Care Professional accepted the claimant's statement to him that she suffered from blackouts but it is equally important to appreciate that for the reasons set out above he had doubts about her evidence for the reasons set out by him in respect of the activity of preparing food. Thus, it would have been apparent to the claimant's representative when presenting the claimant's case that her statement about blackouts was not unequivocally accepted by the Health Care Professional and that this was reflected in his opinion that no point scoring descriptors were satisfied.

6. The task of the tribunal was to assess the evidence which was presented to it. It was for the claimant's representative to present to the tribunal the evidence which it was sought to rely upon for the purposes of advancing the claimant's appeal. It is further apparent that the tribunal considered that it had sufficient evidence to determine the appeal and in paragraphs 19 and 20 of its statement, it said:

> "19. The tribunal considered the further medical evidence from doc 86 and accepted that evidence as the proper medical records of the appellant and

concluded in the light and the submissions that were made by and on behalf of the appellant that these medical records were sufficient tro fully advise the tribunal as to the condition of the appellant for the period covered.

20. The Tribunal made the findings in fact at 1) and 2) above because these followed from the papers and did not appear to be in contention other than that while she claimed to be affected by blackouts this was found not to be the case."

The findings of the fact on page 1 and 2 referred to by the tribunal were in the following terms:

"1. The facts of the case are as set out at Section 2 of the Appeal Submission in addition to and as qualified by the facts set out below and subject to the finding that she was not affected by a condition of blackouts.

2. The main disabling conditions which affected the function of the appellant consisted of urinary incontinence, depression and anxiety, asthma, dyslexia/genetic chromosome abnormality and a stroke 3 years previously leaving a right side weakness.

7. I do not consider that in these circumstances it was necessary for the tribunal to raise with the claimant a potential conclusion which they might reach namely that she did not suffer from blackouts. In a situation where the claimant's representative is prepared to proceed on the evidence which was before the tribunal it was entitled to base its findings in fact upon its assessment of that evidence. It was not for the tribunal to cross-examine the claimant on the evidence that she gave. The task of the tribunal was to assess it. Having been granted an adjournment by another tribunal on 14 March 2018 for further evidence to be produced and that having been done it was not necessary for the tribunal to make further enquiries as is suggested by the Secretary of State in paragraph 12 of the submission. I am not prepared to hold that the tribunal erred in law by listening to the evidence presented to it and at the end of the hearing assessing that evidence and reaching a conclusion thereon. In light of the tribunal's assessment it did not find the claimant credible or reliable in relation to blackouts. There was no evidence to establish a factual foundation to the effect that she did suffer from blackouts.

8. As I indicated in paragraph 7 I do not accept that it was incumbent upon the tribunal to test the claimant's evidence by cross-examining her on her credibility. That in effect is what the guidance in the textbook referred to in paragraph 10 of the Secretary of State's submission is suggesting should be done. The danger of such an approach is that it could be argued that the tribunal is adopting the approach of an adversary rather than the dispassionate assessor of the evidence before it. It follows that I do not accept the guidance given. I cannot accept the submission made in paragraph 11 of the Secretary of State's submission as this appeal had already been adjourned once and in my view the tribunal was entitled to proceed on the basis of the evidence which came before it. It does not seem to me that the cases referred in paragraph 12 are directly in point in this appeal as these cases deal with observations of a claimant made by the tribunal itself which is not the position in this case. In the circumstances I dismiss the appeal.

(Signed)
D J MAY QC
Judge of the Upper Tribunal
Date: 1 February 2019