



Secretary of State for Work and Pensions v GK (ESA)
[2023] UKUT 273 (AAC)

**IN THE UPPER TRIBUNAL
000065-ESA
ADMINISTRATIVE APPEALS CHAMBER**

UT Ref: UA-2023-SCO-

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

Between:

The Secretary of State for Work and Pensions

Appellant

- v -

GK

Respondent

Before: Upper Tribunal Judge Wright

Decision date: 9 November 2023

Decided on consideration of the papers and written representations.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 1 November 2022 under case number SC948/22/00259 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and give the decision the First-tier Tribunal ought to have given. That decision is to disallow the appellant's appeal from the Secretary of State's decision of 17 December 2020. The Secretary of State correctly decided on 17 December 2020 that the claimant (GK) was not entitled to have the severe disability premium included in his award of employment and support allowance for the period 7 July 2020 to 18 December 2020 and from 18 December 2020 onwards.

REASONS FOR DECISION

1. I am satisfied on the arguments before me that the First-tier Tribunal erred in law in the decision to which it came on 1 November 2022 ("the tribunal") and that its decision should be set aside as a result. I am also satisfied on the arguments and evidence before me that I can and should redecide the first instance appeal, which I do in the terms set out above.

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2. Like the First-tier Tribunal, I proceed on the basis that the claimant was validly represented on this appeal to the Upper Tribunal, notwithstanding (a) his apparent lack of capacity, and (b) the lack of any person appointed to act for the claimant under regulation 33(1) of the Social Security (Claims and Payments) Regulations 1997. I need say no more about this issue here.

3. The background to this appeal can be set out quite shortly. The appeal concerns a claimant with an award of employment and support allowance (“ESA”) which has been in place since late 2009. His ESA award included a severe disability premium (“SDP”) from March 2014 pursuant to paragraph 6 of Schedule 4 to the Employment and Support Allowance Regulations 2008 (“the ESA Regs”). It is not disputed before me, and is correct a matter of law in any event, that the continuance of the SDP in the claimant’s award of ESA depended, relevantly, on no one getting an award of Carer’s Allowance for caring for the claimant: per paragraph 6(2)(a)(iii) of Schedule 4 to the ESA Regs (the exact words of which read “no person is entitled to, and in receipt of, a carer’s allowance...in respect of caring for the claimant”).

4. It is also not disputed that the claimant’s mother was awarded Carer’s Allowance, for caring for the claimant, in July 2018. When this came to light, decisions were made by the Secretary of State to the effect that the claimant had not been entitled to (and so had been overpaid) the SDP in his ESA award from 7 July 2020 to 18 December 2020 and that overpayment was in law recoverable from the claimant, and that the claimant was no longer entitled to the SDP in his award thereafter. I need say no more about the decision made by the Secretary of State that the overpayment of the SDP was in law recoverable from the claimant because (i) the First-tier Tribunal allowed the claimant’s appeal against that decision and there is no further appeal against that First-tier Tribunal decision by the Secretary of State, and (ii) in any event, the Secretary of State had already said he would not seek to recover the overpayment.

5. The First-tier Tribunal, however, also allowed the claimant’s appeal against the Secretary of State’s decision that he was no longer entitled to Carer’s Allowance from 7 July 2020 to 18 December 2020 and from 18 December 2020 onwards. It is that decision which the Secretary of State appeals, having been given permission to do so by the First-tier Tribunal on 5 June 2023.

6. The basis for the First-tier Tribunal’s decision in favour of the appellant was, in effect, that the claimant continued to qualify for the SDP in his ESA award, notwithstanding the award of Carer’s Allowance made to the claimant’s mother in respect of her caring for him, because the claimant had given no effective (i.e. competent) consent to the claim for Carer’s Allowance being made by his mother in respect of him. It is this ‘consent’ issue which lies at the heart of this appeal.

7. The precise reasoning the First-tier Tribunal used to explain its decision on this point was as follows (at paragraphs 27 and 34 of its reasons):

“27. The issue of competence appeared to the Tribunal to be fundamental. When an application is made for Carer’s Allowance it requires to be countersigned by the individual who will be receiving the care. That is because, as stated in terms in the form itself, this can impact on the individual’s benefits entitlement. It appeared to the Tribunal that if the claim pack was flawed in that the form had not been properly countersigned then the individual receiving the care had not acquiesced to the loss in whole or part of his benefits; and that any subsequent decision

superseding or revising the individual's entitlement based on the award of Carer's Allowance could be challenged successfully. For example if the Carer's Allowance form had not been countersigned at all then a challenge to a supersession or revision decision relating to Severe Disability Premium should succeed and similar logic would apply if there was a counter signature by an individual who, in the legal sense, lacked competence to sign.

34...the Tribunal was in no doubt that, on the balance of probabilities, the evidence indicated that the claimant lacked legal capacity to sign. On that basis the counter signature was ineffective.”

8. I need not address in this decision issues such as whether a lack of capacity or legal competence can render a claim for benefit invalid even though an award has been made for the benefit. Case law in relation to cases where this issue arose in respect of a claimant's claim for their own benefit (which is not this case as here the issue is about the validity of the claimant's mother's claim for her Carer's Allowance) would at the very least suggest very significant difficulties in the First-tier Tribunal's analysis of this issue in this case. That case law includes, in particular, R(SB)9/84 (as applied in CIS/812/1999) but also *Chief Adjudication Officer v Sheriff* (R(IS)14/96), albeit the latter case was decided in the context of 'misrepresentation' on a claim form under section 71 of the Social Security Administration Act 1992.

9. Nor need I address the jurisdictional basis for how the First-tier Tribunal in this case was able to pronounce in a determinative manner on the claimant's mother's entitlement to Carer's Allowance when no appeal was before the First-tier Tribunal against the decision which had awarded the claimant's mother the Carer's Allowance. I need put it no higher than I have considerable concerns whether the First-tier Tribunal's decision respected the legal finality in respect of decisions awarding benefit found in section 17(1) of the Social Security Act 1998. It is at least arguable that the only relevant question for the First-tier Tribunal on the appeal it had before it concerning the claimant's entitlement to the SDP in his ESA award was whether in fact the claimant's mother was entitled to, and in receipt of, a carer's allowance...in respect of caring for the claimant at the relevant dates. It seems to me that R(S)13/81 very arguably remains relevant post the enactment of section 17 of the Social Security Act 1998 in its holding that an award of benefit, even if it ought never to have been made, remains effective until it is set aside by a court or tribunal exercising a jurisdiction that enables it to set aside the decision. However, it may be asked what the jurisdiction was of the First-tier Tribunal in this case to determine the claimant's mother's entitlement to Carer's Allowance when it had no appeal against the decision awarding the mother the Carer's Allowance and so, given the terms of section 17 of the Social Security Act 1998, that remained a final and lawful award in favour of the mother.

10. The reason I need not decide any of these issues is because I accept the Secretary of State's first and primary argument that the First-tier Tribunal went fundamentally awry (even assuming it had the jurisdiction to consider the issue) in holding that the claimant's consent to the claim for Carer's Allowance was legally relevant to the validity of that claim and the mother's entitlement to Carer's Allowance on that claim. For the reasons explored a little below, the 'cared for person's' view that they do not want a person to care for them and get Carer's Allowance for doing so, may be relevant evidentially to whether Carer's Allowance is awarded to the

person making the claim, but legally the cared for person's view is irrelevant. This is for two reasons.

11. First, and most fundamentally, nothing in the conditions of entitlement for Carer's Allowance set down and mandated in section 70 of the Social Security Contributions and Benefits Act 1992 makes the cared for/severely disabled person's consent a condition of entitlement to Carer's Allowance. Section 70, so far as is relevant, provides (and only provides) as follows:

"70:-(1) A person shall be entitled to a carer's allowance for any day on which he is engaged in caring for a severely disabled person if –

(a) he is regularly and substantially engaged in caring for that person;

(b) he is not gainfully employed; and

(c) the severely disabled person is either such relative of his as may be prescribed or a person of any such other description as may be prescribed."

12. The rest of section 70 in effect sets out the circumstances where a person is *not* entitled to a carer's allowance. Those provisions are not relevant as the essence of the First-tier Tribunal's decision is that the cared for person's consent *is* a condition of entitlement. The critical point, however, is that nothing in section 70 requires the cared for person to consent to the Carer's Allowance being awarded. Such an award can therefore lawfully be made regardless of the cared for/severely disabled person's consent to that award being made.

13. Secondly, although making a claim for Carer's Allowance is also a condition of entitlement to that benefit, per section 1 of the Social Security Administration Act 1992, in terms of the validity of the claim it is only matters which affect entitlement to Carer's Allowance which are relevant: see paragraph [56] of *R(IS)6/04*.

14. I therefore agree with the Secretary of State that the making of an effective or valid claim for Carer's Allowance is not dependent on the cared for/severely disabled person's statement on that form being completed. That statement is a safeguard to ensure that the severely disabled person is aware of the claim and its consequences, but as a matter of law it cannot invalidate the claim. As the Secretary of State argues, "a claimant is not to be frivolously deprived of entitlement by omissions that are not directly and crucially relevant to...entitlement".

15. I should add that my use of 'consent' may not be entirely accurate, though it may be a convenient shorthand to describe the cared for/severely disabled person's role in the Carer's Allowance claims process, at least as the First-tier Tribunal saw it. The Secretary of State points out that the claimant was not in fact asked whether he 'consented' to the claim being made. The relevant part of the claim form opened with the statement: "The person you look after needs to know if you are claiming Carer's Allowance as this may affect some of their benefits." The form then contains a section headed "Notes for the person being looked after" which explained what those effects may be. This was followed by a two-part declaration made by the claimant in this case that understood that a claim had been made for caring for him and that in consequence the DWP would "look at" the details of his claims for various benefits.

16. The Secretary of State further explains that the statement went on to address a matter that is related to the conditions of entitlement to Carer's Allowance, by asking the severely disabled person to "confirm" whether or not the claimant for Carer's

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Allowance cares for him for at least 35 hours a week. This, however, is no more than a part of the evidence going to whether section 70(1)(a) of the Social Security Contributions and Benefits Act 1992 was in fact satisfied.

17. For the reasons given above, the Secretary of State's appeal succeeds and I redecide the appeal in the terms set out above.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 9 November 2023