[2013] AACR 32

**(AH v Secretary of State for Work and Pensions (ESA)
[2013] UKUT 118 (AAC))**

Judge Jacobs **CE/1750/2012**
5 March 2013

Work-related activity – Schedule 3 Activity 1 – approach to repeatability and reasonable timescale

Regulation 35(2) – proper approach – need for sufficient evidential base

As part of the conversion process from incapacity benefit to employment and support allowance (ESA), the appellant submitted a questionnaire to say he was unable to walk 50 metres because of pain and fatigue. His GP's report confirmed, among other things, that the appellant had problems in mobilising. A health care professional interviewed and examined the appellant and confirmed he was unable to mobilise for more than 100 metres or to remain at a work station for more than an hour. The Secretary of State decided that the appellant was entitled to ESA because he had limited capability for work but that he did not have limited capability for work-related activity. Following an unsuccessful appeal the appellant's representative applied for permission to appeal to the Upper Tribunal (UT) on the grounds that the F-tT had misapplied Activity 1 of Schedule 3 to the ESA Regulations and that the appellant satisfied regulation 35(2) because he had chronic fatigue syndrome. In granting permission the district tribunal judge asked the UT for guidance about the interpretation of particular words for the purposes of Descriptor 1 of Schedule 3 to the ESA Regulations and whether the meaning of the words was the same within Schedule 2 and Schedule 3.

Held, allowing the appeal, that:

1. the words "repeatedly", "significant discomfort or exhaustion" and "reasonable timescale" were normal words in everyday use. There was no reason why these words should have a different meaning in Schedule 3. The purpose of Schedule 3 was to identify those claimants who were not required to take part in work-related activity by reference to the nature and extent of their disabilities (not by reference to work-related activity itself). The effect of coming within Schedule 3 might differ from that of coming within Schedule 2 but the criteria for classifying claimants was the same. It was not for the UT to provide a more specific content to the law than the language used in the legislation. The key to applying the words within Activity 1 lay in making findings of fact relevant to them which were as specific as the evidence allowed. The F-tT's decision erred in law as it failed to make findings of fact on the terms of the Activity in sufficient detail to show whether or not it applied (paragraphs 18 to 22);

2. the approach of the Court of Appeal in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42, reported as R(IB) 2/09, was approved. Applying that reasoning to regulation 35(2) required the decision-maker to have assessed the range or type of work-related activity which a claimant was capable of performing and might be expected to undertake. There must be appropriate evidence relevant to each of the two elements: (i) the nature of the work-related activity (which must be provided by the Secretary of State for Work and Pensions) and (ii) the claimant's health. The nature of the claimant's disabilities would have determined the nature of the evidence required in order to decide whether regulation 35(2) applied. There were two broad possibilities: either general information was sufficient or evidence on the specific nature of the activity to be undertaken by the appellant was required. In this case, specific evidence (not general information) was required and in its absence the F-tT's decision that regulation 35(2) did not apply was not soundly based (paragraphs 24 to 32).

The UT set aside the decision of the F-tT and remitted the case to a differently constituted panel for rehearing in accordance with its directions.

Editor's note: this is a companion decision to *ML v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 174 (AAC); [2013] AACR 33

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 19 March 2012 at Weymouth under reference SC192/12/00033) involved the making of an error in point of law, it is SET ASIDE under section

12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal and, subject to the tribunal's discretion under section 12(8)(a) of the Social Security Act 1998, any other issues that merit consideration.

B. In particular, the tribunal must investigate and decide whether the claimant should be put into the support group for employment and support allowance from and including 22 September 2011.

C. In doing so, the tribunal must not take account of circumstances that were not obtaining at that time: see section 12(8)(b) of the Social Security Act 1998. Later evidence is admissible, provided that it relates to the time of the decision: R(DLA) 2 and 3/01.

REASONS FOR DECISION

A. The issues

1. This appeal raises two issues of general relevance to the First-tier Tribunal when dealing with claimants who argue that they should be included in the Support Group:

- How should tribunals deal with words like "repeatedly" and "timescale"?

- How should the tribunal deal with regulation 35(2)?

B. History of the case

2. According to the Secretary of State's submission to the First-tier Tribunal, Mr H was entitled to incapacity benefit from 13 February 1990, although that benefit did not exist at that time. He has, according to his GP's report, spinal stenosis, angina, back pain, stress and depression, and chronic fatigue syndrome.

3. In 2011, the Secretary of State arranged for evidence to be obtained with a view to his possible transfer to employment and support allowance. Mr H submitted a questionnaire; he told the tribunal that he had not completed it personally. It indicated that he could not walk 50 metres before needing to stop, adding:

> "I have very limited mobility due to severe pain and fatigue. I am unable to walk outside reliably or regularly. The pains set in straight away. I am in pain even at rest. Both of my legs start with pins and needles, then they go numb, then there is a deep pain in my bones. I have pain in my coccyx. When I walk, I need to stop every few yards to ease the discomfort. I only walk for essential purposes, such as to go to the bank."

His GP completed a report and identified problems with mobilising and coping with change or social engagement. The report ends:

> "Mr H … has adapted well, in my opinion, & undertaken limited voluntary work to[?] aid his overall mental state. I believe formal paid work will prove very difficult for him."

Mr H was then interviewed and examined by a health care professional, who identified problems with mobilising for more than 100 metres, which carried nine points, and remaining at a work station for more than an hour, which carried six points.

4. Having obtained that evidence, the Secretary of State decided that Mr H was entitled to an employment and support allowance from and including 22 September 2011 on the basis that he had limited capability for work, but no limited capability for work-related activity. In other words, he was transferred to employment and support allowance, but not put into the Support Group.

5. Mr H exercised his right of appeal to the First-tier Tribunal, with the assistance of Mrs Mitchell of the Dorset ME Support Group. He produced various information in advance of the hearing, including a list of the number of hours spent in bed over a fortnight. The shortest period was 14½ hours; the longest was 17½ hours. He also provided a certificate of completion of a pain management programme. At the hearing, he said that he was only able to attend half of the pain management sessions. He told the tribunal that he "could not repeatedly do 50 metres – could not do 100 metres & repeat it." He said that he accompanied his carer to a shop and went around for a quarter of an hour with the help of a trolley.

6. Mrs Mitchell invited the tribunal to consider regulation 35(2) of, and Activity 1 in Schedule 3 to, the Employment and Support Allowance Regulations 2008 (SI 2008/794). She told the tribunal that Mr H could not sustain activity of any sort and could not sustain effort for more than an hour.

7. The tribunal dismissed his appeal. It found that Activity 1 of Schedule 3 did not apply. The essence of its findings are in this paragraph:

> "At the time of the medical assessment on 17/08/11 and at the appeal hearing the Appellant was living alone in a bungalow with one step. He had a female friend (his registered carer) who stayed overnight sometimes and who did the housework and cooked. The Appellant would go shopping with his friend who would drive him by car. They would park as close as possible to the shop entrance when the Appellant would accompany his friend while shopping. He would make use of a shopping trolley and the shopping would take at least 15 minutes. He would walk slowly and would need to stop and rest several times and would visit a café where he would rest. These short shopping trips were not for the main bulk shop, which his friend would do herself. He was able to attend the local Weymouth disabled club and play bingo. He had a wheelchair in which he could be pushed on trips out with the club, but which he did not propel himself. He had stopped these trips some time before the Tribunal hearing."

On these findings:

> "The tribunal is of the opinion from all the evidence that at the time of the decision on 31/08/11 that the Appellant would have been able to mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion, or repeatedly mobilise 50 metres within a reasonable timescale because of significant discomfort or exhaustion. It is accepted that the Appellant has restricted mobility, but it is not accepted that when he stops he is at the absolute limit of his capacity, as after a period of rest and recovery, he is able to continue walking without significant discomfort, whether that be during his shopping trips, visits to banks or elsewhere."

8. The tribunal did not deal with Mrs Mitchell's argument on regulation 35.

9. Mrs Mitchell applied for permission to appeal to the Upper Tribunal. Her grounds, in summary, were that:

- the tribunal had misapplied Activity 1 of Schedule 3;
- as Mr H has chronic fatigue syndrome, he should have satisfied regulation 35(2) of those Regulations. This second ground was in paragraph 7, which is mentioned in the grant of permission and set out below.

10. A district tribunal judge gave Mr H permission to appeal. He identified these issues:

> "The Upper Tribunal is asked to give guidance as to the interpretation of the words 'repeatedly … within a reasonable timescale' for the purposes of Descriptor 1 of Schedule 3 to the Employment and Support Allowance Regulations 2008. Do they mean the same in Schedules 2 and 3, notwithstanding that Schedule 3 descriptors are the test of whether a claimant has limited capability for work-related activities and not merely limited capability for work?
>
> Whilst it is anticipated that the First-tier Tribunal's failure to address regulation 35 may be fatal to its decision, it would be helpful to have the observations of the Upper Tribunal on paragraph 7 of the application for permission to appeal."

11. The Secretary of State's representative has not supported the appeal, but Mrs Mitchell has, in reply, maintained both her grounds of appeal.

A. Activity 1 in Schedule 3

The law

12. This provides:

"*Activity*	*Descriptors*
1. Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid can reasonably be used.	Cannot either: (a) mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (b) repeatedly mobilise 50 metres within a reasonable timescale because of significant discomfort or exhaustion."

This is in identical terms to descriptor (a) of Activity 1 in Schedule 2, where it carries 15 points, which alone are sufficient to show that a claimant has limited capability for work.

13. The Secretary of State's representative has conceded that, subject to any particular provision within an activity or descriptor, the test is whether an activity can be undertaken repeatedly, reliably and safely. I accept that concession, which is consistent with the case law.

14. In the case of Activity 1, there is a clear contrast in the language. Descriptor (a) applies if the claimant cannot mobilise for more than 50 metres without stopping, whereas descriptor (b) applies if the claimant can do so, but not "repeatedly … within a reasonable timescale". That makes it impossible to read the need for regularity into descriptor (a).

15. Regulation 34(2) is also relevant:

> "(2) A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor."

The arguments on the appeal

16. Mrs Mitchell has criticised the tribunal for failing to deal with such matters as "the frequency with which Mr H … was able to walk tentatively around the supermarket, the distance that he could walk before needing to stop and the effects of this walking on his medical condition after he had walked". She added that this raised issues on "repeatedly", "significant discomfort or exhaustion" and "reasonable timescale".

17. The Secretary of State's representative has argued that, on the evidence, the tribunal was right to find that Mr H did not satisfy Activity 1.

Analysis

18. The words "repeatedly", "significant discomfort or exhaustion" and "reasonable timescale" are normal words in everyday use. Like all words, they take their meaning from their context, or at least the context colours their meaning. I can, though, see no reason why they should have a different meaning just because they appear in Schedule 3. The purpose of that Schedule is to identify claimants who are not required to take part in work-related activity. But it does so by reference to the nature and extent of their disabilities, not by reference to work-related activity itself. The effect of coming within Schedule 3 may differ from the effect of coming within Schedule 2, but the criteria for classifying claimants are the same.

19. I am not going to attempt to define what these words mean. That would be wrong. It would be the wrong approach to statutory interpretation and would trespass impermissibly into the role of the First-tier Tribunal. It is not for the Upper Tribunal to give more specific content to the law than the language used in the legislation. The Upper Tribunal will not decide that "repeatedly" means five times, ten times or any other number. Nor will the Upper Tribunal decide that "reasonable timescale" means five seconds, five minutes or any other time.

20. The correct approach was explained by Lord Upjohn in *Customs and Excise Commissioners v Top Ten Promotions Ltd* [1969] 1 WLR 1163, at 1171:

> "It is highly dangerous, if not impossible, to attempt to place an accurate definition upon a word in common use; you can look up examples of its many uses if you want to in the Oxford Dictionary but that does not help on definition; in fact it probably only shows that the word normally defies definition. The task of the court in construing statutory language such as that which is before your Lordships is to look at the mischief at which the Act is

> directed and then, in that light, to consider whether as a matter of common sense and every day usage the known, proved or admitted or properly inferred facts of the particular case bring the case within the ordinary meaning of the words used by Parliament."

21. The key to applying the words of Activity 1 lies in making findings of fact relevant to those words that are as specific as the evidence allows. And, if the claimant is present at the hearing, the tribunal should ensure that it obtains evidence that is sufficient to that purpose. Just to take one example: the tribunal should have probed Mr H's evidence that he "could not repeatedly do 50 metres". How far could he walk before stopping? What made him stop? How did he feel? How soon could he proceed? How often could he repeat that process? This was particularly important in this case, because of the content of Mr H's evidence to the tribunal. At least as it was recorded by the judge – the record of proceedings does not have to be verbatim – his evidence was expressed in the language of the Schedule. The tribunal had to obtain evidence that would allow it to assess Mr H's answers by reference to that language. It could not do that if the evidence repeated that language. The tribunal would at least need to know what Mr H meant by "repeatedly", as he might not be using it in the same way as in Activity 1.

22. I accept Mrs Mitchell's argument that the tribunal failed to make findings of fact on the terms of the Activity with sufficient detail to show whether or not it applied. For this reason, the tribunal's decision involved an error of law. I am not able to say that the tribunal came to the right decision, because the evidence is not sufficient to allow me to do so.

B. Regulation 35(2)

The law

23. This provides:

> "(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if –
>
> (a) the claimant suffers from some specific disease or bodily or mental disablement; and
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> (b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity."

This paragraph applies to the effect of work-related activity. It is similar to regulation 29(2), which applies to the effect of work. And that paragraph was equivalent to regulation 27(b) of the Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311).

Charlton

24. The Court of Appeal considered regulation 27(b) in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42, reported as R(IB) 2/09. Moses LJ said that, although the case concerned incapacity benefit,

> "4. … the question of interpretation remains relevant to the regulations made under the new scheme introduced by the Welfare Reform Act 2007."

In other words, it remained relevant to employment and support allowance. It is directly relevant to regulation 29(2), which differs from regulation 27(b) only in the change of terminology

appropriate to employment and support allowance. But to what extent, if at all, is it relevant to regulation 35(2)? In order to answer that, it is necessary to see what the Court decided.

25. The Court first decided that the paragraph applied to the effect of work and not just, as its language suggested, to the effect of being found capable of work. In other words, the paragraph applied not only to the immediate effect of the decision that the claimant was no longer entitled to incapacity benefit, but also to the consequence of having to seek and then undertake work, including travel to work. That conclusion is equally applicable to both regulation 29(2) and regulation 35(2).

26. The Court then explained how to identify the type of work that had to be taken into account:

> "45. … The decision-maker must assess the range or type of work which a claimant is capable of performing sufficiently to assess the risk to health either to himself or to others."

Obviously, that is not directly applicable to regulation 35(2), which does not envisage the claimant working. However, the Court's reasoning can be applied by analogy to the work-related activity. Translating the language of the judgment into terms of work-related activity comes to this:

> The decision-maker must assess the range or type of work-related activity which a claimant is capable of performing and might be expected to undertake sufficiently to assess the risk to health either to himself or to others.

Evidence

27. The evidence is the key to applying that paragraph. It consists of two elements and there must be appropriate evidence relevant to each element. The elements are the nature of the work-related activity and the claimant's health.

28. The evidence on the work-related activity can only come from the Secretary of State. The only mention of this in the file that I have found is in paragraph 7 of the Secretary of State's submission to the First-tier Tribunal:

> "The purpose of being in the Work Related Activity Group is to take the first steps into looking at the barriers to future work and seeing if there are any ways to overcome these, including any reasonable adjustments that would need to be made to any work place, work station or job role. Mr H… would receive support throughout this from the Health and Disability Employment Advisor and it is not considered that this would cause a substantial risk to his mental or physical health. In form ESA113, [his GP] suggests voluntary work would actually aid Mr H…'s mental state."

29. The evidence on Mr H's health and his case on regulation 35(2) is set out at its clearest in paragraph 7 of Mrs Mitchell's application for permission to appeal, to which the judge referred when giving permission:

> "We consider that Mr H… satisfies Regulation 35 because of the nature of one of his medical conditions, Chronic Fatigue Syndrome (CFS/ME). Mr H… is unable to undertake any kind of activity without becoming depleted of energy, so exhausted that he needs to sleep for 18 hours a day. He is rarely able to leave his house, and, when he goes out, he is driven by his carer, and most walking is just transferring to and from the car. If he is

> required to undertake work-related activity, such as attend an interview at the Jobcentre, he needs to plan in advance, banking energy by resting more than usual, and requires assistance to get to the appointment. Bearing in mind that Lord Freud has stated publicly that any such activity must be capable of being carried out reliably, repeatedly and safely, we contend that Mr H… is unable to carry out work-related activity predictably or with consistency. If he pushes himself to become active above his usual limitations, he becomes excessively exhausted, with increased levels of pain; if he were to do this repeatedly, there would be a serious deterioration in his medical condition of CFS/ME."

30. The tribunal was, therefore, presented with evidence in the most general terms from the Secretary of State and a carefully argued case on behalf of Mr H.

31. The nature of the claimant's disabilities will determine the nature of the evidence that the tribunal needs in order to decide whether regulation 35(2) applies. Broadly, there are two possibilities. In some cases, the tribunal will need only general information in order to decide that a particular claimant does or does not satisfy section 35(2). For example: a claimant whose only disability is restricted mobility should have no difficult in attending an interview or an appropriate course. In other cases, the tribunal will need evidence on the specific nature of the activity that the claimant would have to undertake.

32. In this case, Mr H's mobility was restricted. If that had been all, the tribunal might have been able to deal with the argument on the limited information in the Secretary of State's submission. But there was more to the argument than that. Mrs Mitchell argued that Mr H also experienced fatigue and based her argument on the impact that work-related activity would have on this aspect of his health. The tribunal could not have dealt with that argument without having some specific evidence of the type of activity that Mr H might be expected to undertake. Just to take a couple of examples: What type of adjustments might be reasonable in Mr H's case? What sort of support would the Advisor be able to provide for him? In the absence of that evidence, it was unable to decide how regulation 35(2) applied. Its decision that it did not was not soundly based in evidence.

33. For this reason also, the tribunal's decision involved an error of law.