IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No.CE/3883/2012

Before Judge Mark

Decision: The appeal is allowed. I set aside the decision of the tribunal and remit the case for rehearing before a new tribunal in accordance with the directions given below.

REASONS FOR DECISION

1. This is an appeal with the permission of a Judge of the Upper Tribunal from a decision of the First-tier Tribunal following a hearing on 1 June 2012. That decision dismissed the claimant's appeal from a decision of the Secretary of State made on 24 January 2012 that although the claimant had limited capability for work due to his mental health problems, he did not have limited capability for work related activities. The decision followed an examination by an approved disability analyst (a registered physiotherapist) and essentially adopted her views.

2. The claimant was born in 1982. He was awarded ESA from and including 6 April 2009 on the basis that he was suffering from depression. He was medically examined in March 2011, following which a decision maker decided that he should be treated as having limited capability for work and he was placed in the work related activity group. The claimant then appealed and this led to a decision by a decision maker on 27 July 2011 that he should be placed in the support group. Within 4 months he was required to complete another questionnaire. That is was another one appears from the decision maker's submissions to the tribunal although the first one was not in evidence, nor was any of the material before the decision makers who had made their decisions in March and July 2011.

3. In the questionnaire, which he dated 25 November 2011, the claimant was asked about any help he would need if he had to go for a face-to-face assessment. He replied that he did not think such meetings were a good idea, continuing "I become extremely agitated and angry during most contact I have with people, as you can see from the notes from the previous interviews". I interpose that these notes, which may refer to, or include, the report from the previous assessment in March 2011, were not included in the file before the tribunal.

4. The claimant went on to explain that he suffered from extreme bouts of anger and rage which could lead him to become very depressed to the point that he had to lock himself in his room for fear of losing his temper and becoming violent. This caused him to alienate family and any friends he used to have. He also claimed to struggle to function even with day to day activities such as shopping or travelling. He had to avoid supermarkets because of numerous altercations as well as public transport being a bad idea because of the contact with other people.

5. He provided details of his GP and of a psychotherapist with whom he had an appointment on 21 December 2011 and stated that he was still on a waiting list for treatment at a clinic and would attend weekly appointments when he reached the top of the list. Meanwhile he saw his GP for interim appointments.

6. In relation to the descriptor as to initiating actions, he stated that some days he was literally shaking with rage and could not leave his room to shower or make meals for fear of how he would behave if forced to interact with other people. This could sometimes last several days and led to severe bouts of depression and anxiety. In relation to going out, he stated that he had to avoid places where other people were which made normal day to day routines impossible. He barely ever left his house unless accompanied by a relative and even then it would only be to go to their house and never anywhere public. Finally, in relation to coping with social situations he stated that he never knew how he would act or what he would say or do or if he would become angry. People did not understand and they became offended which only made him more angry and could lead to him shouting and physical violence. This happened on a regular basis. Whenever he had to interact with people, he got involved in confrontations. This made him nervous about any interaction with people before it happened.

7. The claimant was then assessed by an approved disability analyst on 10 January 2012. Somewhat remarkably, considering that the claimant's problems were entirely mental ones, the disability analyst in question was, as I have noted, a registered physiotherapist, with no apparent professional expertise in mental health matters beyond what she may have gleaned from whatever training she was provided to become a disability analyst. The entire examination took 15 minutes and as usual the analyst had no access to the claimant's medical records.

8. She records that the claimant was taking no medication for depression, that the problem started many years previously and that his main problem was with irritability and managing his anger. He also had low moods and had days when he was furious with everybody and everything. He would lock himself in a room and not go out some days because of this. This had last happened a week and a half previously. He saw a therapist occasionally, the last time before Xmas, but had no further firm appointment. The notes go on "Has an open appointment but is on the waiting list for open appointments. Not taking any medication. Speaks to his GP on the phone because of this."

9. Other recorded information as recorded by the physiotherapist (although the accuracy of some statements is challenged by the claimant) is that he had come to the examination centre with his grandmother. He lived with his landlord. He had left work three years earlier, mainly because of his mental health. He had been a sales assistant. On a bad day he would stay in bed and would not go downstairs. This had last happened a week before "and lasted for about five" [sic]. Whether days or hours is not stated. The time before was about a week previously. He sometimes felt he wanted to kill somebody. He last actually hit somebody about 18 months earlier. He shopped online and had his food delivered. He had been banned from local shops because he causes a scene. He saw his grandmother when she visited and she came around fairly regularly.

He paid for everything online and ordered his clothes on ebay. His grandmother took him in a car to the therapist but he would consult him on his own. He saw his mother very little and had no friends who would call around and visit. He would occasionally have a chat with his landlord but not socially.

10. In expressing her opinion as to the claimant's mental, cognitive and intellectual function, the physiotherapist noted that he appeared well kempt, looked well, did not appear to be trembling, did not make rocking movements, had normal facial expression, was able to sit still during the interview and coped well at the interview. He did not ruminate, had no obsessive ideas, did not experience hallucinations, was oriented in time, place and person, did not require prompting at the interview and had adequate concentration on examination. He had good insight into his illness and adequate awareness of danger and normal long and short term memory. Increased sweating was not apparent, he had adequate rapport and eye contact and normal speech. He was, however, also described as irritable and not very communicative during the assessment and verbally abrupt when questioned. He stated that he would only go out with his grandmother because he felt that he would behave inappropriately – it is unclear, but presumably this means that he felt he would behave inappropriately if he went out without her. He sat in the waiting room on his own. He saw very few people in a typical day but managed to maintain a working relationship with his landlord.

11. There was no medical evidence before the tribunal, but the claimant had written a letter dated 19 April 2012. In it he stated that he wished to continue with his appeal but did not want to appear at a hearing in essence because of his serious anger management problems and depression. He did not consider that his illness had been accurately represented by the physiotherapist in her report due to the nature of his illness. He went on to state that he suffered from severe bouts of depression brought on by uncontrollable anger and rage. He had seen numerous mental health professionals and been given many different diagnoses, the two most common being depression and narcissistic personality disorder. He was currently on an 18 month waiting list for individual psychiatric behavioural therapy because he could not be placed in group therapy. All of the various mental health professionals he had seen agreed that there was a very real risk of his being physically and emotionally abusive towards other patients. He was extremely hostile when forced into situations where he had to interact with other people. This was mentioned in all his medical assessments. He went on to describe how he had been banned from local shops and why he could not use public transport and that he had assaulted and fought with almost all his old friends, with whom he could no longer socialise. When employed, he would alienate every other member of staff within a few days or weeks.

12. The claimant went on to question the accuracy of certain reported statements of his in the physiotherapist's report, and gave further information as to his condition and the way he behaved.

13. The tribunal dismissed his appeal, holding that he did not satisfy any of the descriptors in Schedule 3 to the Employment and Support Allowance Regulations 2008 and that he also did not satisfy regulation 35 of those regulations. It upheld the award of ESA on the basis that the claimant had limited capability for work.

14. In the statement of reasons it is noted that none of the papers relating to the decision in the claimant's favour in July 2011 were before it, but the tribunal was not troubled by that because, as stated in paragraph 6 of the statement of reasons, the descriptors in Schedule 3 had changed in the meantime and although section 35 remained unchanged "whether that would apply is generally a matter of judging the information available. We were competent to carry out that judgement without more." While the tribunal unquestionably needed to judge the information available to determine whether regulation 35 applies, the question the tribunal should have addressed was whether the earlier material could have assisted it in that respect and, if so, whether there should be an adjournment so that it could be obtained.

15. The tribunal also considered the letter of 19 April 2012 (misdated 2010 in paragraph 8 of the statement of reasons) and concluded that there was no other information that the claimant could provide it with, and accepted that he did not wish to attend a hearing, noting the explanation why this was so. It therefore decided to proceed without more ado. Given the claimant's written evidence as to his conduct, and his references to his mental health history, it appears to me that the claimant could clearly have provided further evidence as to the degree of harm he had caused when he had assaulted people in the past, and the circumstances that had led him to do so. He also referred to mental health professionals he had seen and the assessments he had received. Plainly it could have assisted to have obtained further information from him, or preferably his medical records relating to his mental health and history of violence from his GP including any reports that had been provided.

16. The statement of reasons summarised the claimant's questionnaire and stated that it was struck by the claimant's apparent level of insight into his condition. It then turned to the physiotherapist's assessment, observing that 15 minutes was a rather short time for an assessment "but she appears to taken a thorough history and reached conclusions that are reasonable" It set out a summary of the report and noted that the claimant took issue "with some of the detail". It continued that the only sign of any mental ill health detected was that the claimant seemed irritable and impatient "although they can equally be entirely normal states that don't indicate anything significant at all. He had been involved in a fight about a year previously. No other signs of mental illness were noted. The HCP [health care professional] expressed her opinions clearly and based then [sic] on her observations and on the things that [the claimant] said to her and, as importantly, the way that he said them. He was, as a matter of fact, able to visit local shops and he had managed to interact with her and answer probing questions. She found that he occasionally had uncontrollable episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace but nothing else know to the WCA. She did not identify that there was any risk to [the claimant] or anyone else if he was not found to have limited capability for work."

17. There is one clear error as to the content of the report which is that the physiotherapist reported that she had been told by him that he had been banned from local shops and did all his shopping on line, not, as the statement of reasons states, that she found that he was able to visit those shops.

18. The tribunal concluded that the report struck it as reliable. It then went on to consider the Schedule 3 descriptors. It is unnecessary to refer to most of these. The two which most obviously called for consideration were descriptor 13, engagement in social contact, and descriptor 14, daily uncontrolled episodes of aggressive or disinhibited behaviour that would be unreasonable in any workplace. The tribunal concluded that the claimant could socialise, although only to a very limited extent, and that he had some control over his episodes of aggressive or disinhibited behaviour. It also emphasises that these episodes should be on a daily basis and concluded that this was not made out.

19. In relation to regulation 35, the question for the tribunal in this case was whether the claimant suffered from some specific mental disablement by reason of which 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. The statement of reasons states that "Such activity includes looking for work and attending training tailored to meet the needs of the individual disabled person. We could not envisage that [the claimant] would be unable to cope with that or that in doing so there would be a substantial risk to his health or that of anyone else."

20. In my judgment, the tribunal was in error of law in failing to adjourn and direct the production of the claimant's medical records insofar as they related to his mental problems. Having failed to adjourn, it also failed to explain how it dealt with the hearsay medical evidence provided by the claimant in his questionnaire and letter. That evidence clearly related to the claimant's need for individual therapy because of his behaviour towards other patients in group therapy and to hostile behaviour generally. If the tribunal accepted that the claimant had accurately represented that evidence, then it had probative value as expert medical evidence, although it was plainly preferable to have the original records as evidence if available. The tribunal was also in error of law in failing to adjourn to obtain the medical and other evidence on which the decision of July 2011 was taken. That was only a few months earlier and there was no suggestion of any change in the claimant's mental health in the meantime. As the tribunal pointed out, the Schedule 3 descriptors had changed in the meantime, but that did not mean that there was no earlier evidence that was relevant either to the new descriptors or the application of regulation 35.

21. Further, the only evidence before the tribunal, apart from the evidence of the claimant, was that of the physiotherapist. I have no doubt that the physiotherapist has received training to ask relevant questions and to make relevant observations. Subject to any question as to their accuracy, the report on what the claimant stated and on the observations made is clearly relevant evidence. Where the disability analyst possesses relevant medical expertise, any opinion expressed based on that expertise is also relevant evidence.

22. Where, however, the disability analyst is a physiotherapist and the problems she is dealing with are mental health problems the opinion of the physiotherapist as to the conclusions to be drawn have no probative value whatsoever. This is because the physiotherapist has no professional expertise in mental health

matters. Although the strict rules of evidence do not apply, a tribunal can only take into account evidence that has probative value, so that, for example the decision of another judge as to the facts is simply his or her opinion as to the facts and has no probative value (see *AM v Secretary of State*, [2013] UKUT 094 (AAC), paragraphs 19-24, and the interim decision of Judge Turnbull in CH/1168/2011 setting aside the decision of a tribunal on the ground that it had relied in part on the findings of fact of another tribunal which represented no more than the opinion of that earlier tribunal as to the matter).

23. I can only express my surprise that in a case where the only issue was the mental health of the claimant and its effect in relation to the mental health descriptors, the report was prepared by a physiotherapist following a 15 minute interview. It is plainly important that questions of mental health should be assessed by a disability analyst with appropriate mental health qualifications if their opinion is to be of any evidential value. Even then tribunals should beware of placing too much weight on such reports, based as they are on a very short interview with a claimant and without access to medical records. Given the evidence that the claimant was irritable and abrupt at a 15 minutes interview, and given a history of frequent loss of control of his temper, and the absence of medical records, I do not see how any competent mental health professional could have expressed any firm opinion as to the risks if the claimant was found not to have limited capability for work-related activity. The opinion of somebody with no mental health qualifications in such circumstances should have carried no weight at all. I would add that in addition I am not even clear how far the physiotherapist was aware of what those work-related activities would be.

24. A further question, raised by the judge giving permission to appeal is whether the tribunal should have made findings as to the work related activity that the particular claimant would be required to undertake in reaching a conclusion in relation to the application of regulation 35. If a person is found not to have limited capability for work-related activity, he will be required to undertake such activity. At the date of the decision, the decision maker may not know exactly what that will involve, although the Secretary of State will then need to notify the claimant of a requirement to undertake work-related activity by including the requirement in a written action plan given to the person, which must specify the work-related activity which the person is required to undertake and any other appropriate information (see regulation 5 of the Employment and Support Allowance Regulations 2011, in force from 1 June 2011). Work-related activity is defined in section 13(7) of the Welfare Reform Act 2007, in relation to a person, as activity which makes it more likely that the person will obtain or remain in work or be able to do so.

25. It appears to me that, except to the extent that the written action plan takes into account matters which occur after the date of the decision, it is evidence of the sort of work-related activity which the claimant can have been expected to undertake at the date of the decision, and that to enable the tribunal properly to consider the application of regulation 35, a copy of that plan ought to be provided by the Secretary of State to the tribunal. That was not done in the present case.

26. The new tribunal should be provided by the Secretary of State with a copy of that plan and of any other information as to the work-related activities that the claimant is expected to undertake so as to enable the new tribunal properly to consider regulation 35. The question whether the claimant has undertaken those activities and, if so, with what effect, may also be relevant insofar as it sheds light on the risk, judged as at the date of the decision, to the mental or physical health of any person of the claimant being found not to have limited capability for work-related activity.

27. As already indicated, the new tribunal will also need copies of the claimant's medical records insofar as they relate to his mental health and copies of the evidence on which the earlier decisions in 2011 were based. In considering all these matters, the new tribunal will also need to bear in mind that if the claimant has only avoided a substantial risk to his or another person's mental or physical health by shutting himself up in his room and avoiding contact with others for the majority of the time, that situation may change if he is required to undertake work-related activity and does so.

28. I have not had any regard on this appeal to the additional information provided by the claimant, but his letters should be before the new tribunal and he should consider whether he wishes to add to them in the light of my observations on this appeal. He should also consider whether there is any way in which he could attend an oral hearing to answer any further questions from the new tribunal.

29. The new tribunal should, if at all possible, include a doctor with relevant mental health qualifications. The tribunal will also need to consider whether it would be assisted by an oral hearing. If it has concerns about such a hearing because of the fear of violence, then it may wish to take such concerns into account in considering the application of regulation 35.

(signed) **Michael Mark**
Judge of the Upper Tribunal

5 June 2013