IN THE UPPER TRIBUNAL **Appeal No. CE/1585/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before Upper Tribunal Judge Poynter

DECISION

The appeal to the Upper Tribunal is allowed.

The making of the decision of the First-tier Tribunal given at Nuneaton on 10 February 2017 under reference SC222/16/00203 involved the making of an error on a point of law.

That decision is set aside.

I remake the decision as follows:

> **The decision issued by the Secretary of State on 1 August 2016 is set aside.**
>
> **The claimant is entitled to employment and support allowance.**
>
> **From and including the fourteenth week of that entitlement, the rate at which the claimant is entitled to ESA includes the support component.**

REASONS FOR DECISION

Introduction

1 The claimant appeals with the permission of Upper Tribunal Judge Ward against the above decision of the First-tier Tribunal ("FTT"). There is no question that the claimant is entitled to ESA. The only issue before the FTT was whether, as the Secretary of State maintains, the rate of ESA should include the work-related activity component or, as the claimant maintains, the support component.

2 Neither party has requested an oral hearing of the appeal to the Upper Tribunal and I do not consider that I need to hold a hearing in order to deal with this matter fairly and justly.

Background and procedural history

3 The claimant, who was 54 at the date of the Secretary of State's decision, has the considerable misfortune to suffer from progressive spastic paraparesis. One functional effect of that condition is that his ability to walk is restricted. Another is that his voluntary control over his bladder is reduced.

4 The claimant was awarded ESA at the assessment rate from and including 12 August 2015.

5 On 3 September 2015, he completed a *Limited Capability for Work Questionnaire* (Form ESA50). In reply to the question:

> "How far can you move safely and repeatedly on level ground without needing to stop?"

he said:

> "It varies.
>
> Less than 50 metres, the neurologist timed me walking 10 metres and was shocked at how long it took. I have been told that my difficulties will get worse. I tire very quickly[,] stumble and fall due to the severe mobility difficulties".

6 On 11 July 2016, the claimant was assessed by a Health Care Professional—in this case, a doctor—for the purposes of the work capability assessment. The doctor's report records that:

(a) Among other things, the claimant told her that he:

> "Walks very slowly all the time.
>
> …
>
> Always uses two walking sticks.
>
> He can go out alone and can cross the road safely at a pedestrian crossing. …
>
> … He can go out alone but struggles to walk for prolonged distances which he is unable to quantify, and it takes him around 5 minutes to walk down the path at home to his car which is less than 15 metres due to the manner of his walking being unsteady.
>
> …
>
> He can sit to travel as a passenger and got a lift to the assessment centre from a friend who stayed in the waiting room. He can use the mobility scooters in shopping centres as it is

quicker to get around that way. [H]e could propel a manual wheelchair and has enough room to store a wheelchair at home."

(b) On examination, the muscle tone in the claimant's legs was increased (spasticity being a condition in which in certain muscles are continuously contracted, causing tightness of the muscles), the power in his legs was slightly reduced, knee reflexes were brisk and "there appeared to be slight muscle wasting affecting both legs and calves". The doctor also recorded that the neurological examination "revealed increased tone, brisk reflexes, poor coordination and poor balance. There was a normal range of movement in all joints. All findings in relation to the claimant's upper limbs were normal.

(c) The doctor observed that the claimant used two sticks, that his gait was unsteady, that he had walked 20 metres very slowly to the examination and that he had elected to remain seated in the upright chair for the lower limb examination and kept his foot splints and shoes on. However, all upper limb movements appeared fluid and pain-free.

7 The doctor advised the Secretary of State that the claimant should score 21 points for descriptors in Schedule 2 to the Employment and Support Allowance Regulations 2008 ("the ESA Regulations") as follows:

Activity	Descriptor	Points
1. Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid is normally, or could reasonably be, worn or used.	(d) Cannot unaided by another person either: (i) mobilise more than 200 metres on level ground without stopping in order to avoid significant discomfort or exhaustion; or (ii) repeatedly mobilise 200 metres within a reasonable timescale because of significant discomfort or exhaustion.	6
9. Absence or loss of control whilst conscious leading to extensive evacuation of the bowel and/or bladder, other than enuresis (bed-wetting), despite the wearing or use of any aids or adaptations which are normally, or could reasonably be, worn or used.	(a) At least once a month experiences: (i) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder; or (ii) substantial leakage of the contents of a collecting device sufficient to require cleaning and a change in clothing.	15
	Total	**21**

but no points under Schedule 3 and that regulation 35 of the ESA Regulations did not apply to him.

8 The passages quoted at 6(a) above were repeated as part of the doctor's justification for the award of Descriptor 1d. However, her assessment summary makes no reference to the use of a wheelchair. Rather, what she said was:

> "He has an inherited neurological problem with progressive spastic paraparesis. He is under follow up by neurologists and takes prescribed medication. He has no interventions planned but awaits gait analysis. He walks with two walking sticks. He can climb stairs at home using a hand rail, can sit to travel as a passenger and stands to shower leaning on the shower cubicle walls. On observation, he walked 20 metres with his walking sticks, sat for 15 minutes, stood for 2 minutes supported by his sticks at examination showed reduced right and left lower limb power and increased tone, with brisk reflexes and calf muscle wasting. *The evidence is of restriction of walking for prolonged distances reliably and repeatedly*, but significant disability of climbing stairs, standing and sitting is unlikely. He has no upper limb problems" (my emphasis).

In other words, the doctor appears to have made her recommendation to the Secretary of State on the basis that the claimant could repeatedly *walk* for more than 50 but less than 200 metres, rather than because she considered he could propel (or repeatedly propel) a manual wheelchair for that distance.

9 There was some evidence that suggested that the doctor may have under-assessed the claimant. On 27 February 2015—almost 17 months earlier in the course of a progressive disease—a Consultant in Neuro-Rehab examined the claimant and recorded:

> "In his upper limbs, he has normal tone, power and coordination. He is weak in his lower limbs especially in hip extension (grade 2 bilaterally, knee flexion grade 3 bilaterally, ankle dorsiflexion and EHL grade 3 bilaterally) he has grade 2 spasticity in both lower limbs (on the Modified Ashworth Scale). He is able to appreciate sensations in his lower limbs but there is a sensory level at D5 on the left and D7 on the right. Vibration sense was impaired at his feet but position sense seems to be fairly intact."

10 Muscle weakness is assessed on a six-grade scale where Grade 5 denotes normal strength and Grade 0 denotes no muscle movement. Grade 2 denotes an ability to move the joint if gravity is eliminated (*i.e.,* if the limb is supported) and Grade 3 denotes an ability to move the joint against gravity but not against added resistance. "EHL" is an abbreviation for "extensor hallucis longus" which is the muscle that extends the big toe and assists in inverting the foot and dorsiflecting the ankle. The reduction of power in the claimant's legs that the Consultant found on examination was therefore more than "slight".

11 The Modified Ashworth Scale grades muscle tone according to the following descriptions:

> "0 No increase in muscle tone
>
> 1 Slight increase in muscle tone, manifested by a catch and release or by minimal resistance at the end of the range of motion when the affected part(s) is moved in flexion or extension
>
> 1+ Slight increase in muscle tone, manifested by a catch, followed by minimal resistance throughout the remainder (less than half) of the ROM
>
> 2 More marked increase in muscle tone through most of the ROM, but affected part(s) easily moved
>
> 3 Considerable increase in muscle tone, passive movement difficult
>
> 4 Affected part(s) rigid in flexion or extension".

As the claimant had been at Grade 2 on that scale over 16 months previously, and as his condition was unlikely to have improved in the meantime, to say merely that the claimant's muscle tone was "increased" (in the sense that it was higher than normal) lacked necessary detail.

12 On 1 August 2016, the Secretary of State decided that the claimant had limited capability for work but did not have, and could not be treated as having, limited capability for work-related activity.

13 Contrary to what is said at paragraph 1 of the FTT's written statement of reasons, that decision was made solely on the basis that the claimant scored 15 points for continence. Despite the fact that the doctor had recommended that he should do so, the Secretary of State did not award the claimant any points for mobilizing and therefore the decision contains no discussion of what the correct descriptor for that activity should be.

14 On 8 August 2016, the claimant applied for a revision of that decision (*i.e.,* he applied for what is now described as a mandatory reconsideration). Although he did not quote the descriptor by number, the terms of his application asserted that he satisfied Descriptor 1 in Schedule 3:

Activity	**Descriptor**
Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid is normally, or could reasonably be, worn or used.	Cannot unaided by another person 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.

which would have led to his being placed in the support group and to an award of the support component.

15 On 9 August 2016, the claimant underwent a gait test. That was after the date of the Secretary of State's decision, but so close to it that the results of the test can be fairly regarded as evidence of the claimant's condition at that the date of the decision. The findings on examination were that:

> "[The claimant] presents with no contractures at hip or knee level. There is limited hip motion bilaterally; popliteal angles are increased to (R) 90° and (L) 80°. There is equinus of (R) 15° and (L) 10°; weight-bearing foot posture as cavus bilaterally. There is a measured leg length discrepancy, (L) 1cm shorter.
>
> There is severe (R) gastrocnemius spasticity, moderate (L) and bilateral hamstring spasticity and mild in the (R) adductors and (L) tibialis posterior. Lower limb strength is reduced throughout with a particular weakness noted in the foot/ankle musculature (L>R) and (R) extensors and adductors."

In addition, a gait analysis was carried out and the data were interpreted as follows:

> "Video and kinematic data shows in the sagittal plane anterior pelvic tilt with a double bump pattern. Hip flexion is increased in stance (R>L) and bilaterally in swing. There is increased (L) knee flexion throughout stance whilst the (R) is in hyperextension; there is a stiff knee pattern bilaterally in swing. [The claimant] makes bilateral flat foot contact with dorsiflexion throughout on the (L) and mild equinus in swing on the (R). There are no significant deviations in the coronal plane. In the transverse plane there is bilateral foot adduction; foot progression is internal on the (L) and neutral on the (R).
>
> Foot kinematics shows the (R) equinas occurs at hindfoot level. There is mild (L) hindfoot inversion leading to forefoot supination relative to the tibia. There is (R) hindfoot internal rotation with (L) forefoot adduction leading to bilateral forefoot adduction relative to the tibia. Arch height is increased bilaterally.
>
> Trunk kinematics shows a forward trunk lean relative to the lab secondary to the anterior pelvic tilt.
>
> EMG data shows prolonged hamstrings, premature and prolonged gastocnemius and absent 2nd burst of tibialis anterior bilaterally.
>
> Temporal parameters show a significantly reduced speed to 20% due to a decrease in cadence and stride length. There is a step length asymmetry, (L) shorter with increased double support time.
>
> Gait Profile Score is increased to 11.6° due mainly to deviations in the sagital and transverse planes."

16 On 18 August 2016, a different decision maker refused to revise the decision date 1 August 2016 on mandatory reconsideration. In relation to mobilizing, the mandatory reconsideration decision repeated the evidence I have set out above, including what the HCP had said the claimant had said to him about wheelchairs and concluded:

> "I have considered all the available evidence and find that you do not satisfy the Support Group criteria in this activity."

So the mandatory reconsideration decision also did not say in terms that the claimant did not score more points for mobilising because it was considered he could mobilise in a wheelchair.

The appeal to the FTT

17 On 5 September 2016, the claimant appealed to the FTT. The Secretary of State's response to the appeal did not mention the claimant's supposed ability to mobilise in a wheelchair, although, of course, the accompanying documents included the passages I have set out above.

18 At the hearing on 10 February 2017, the judge's refreshingly legible record of proceedings, notes the following exchanges:

> "D[octor]: Wheelchair used?
>
> [A:] Not on my own. We went to Portugal last year. I wasn't as bad [then]. I managed okay at E. Mid[land]s airport. At Portugal I ended up in a wagon to the side of the plane + wheelchair to coach + same on the way back. I would've had to walk to the coach. I was pushed by S. O. at airport. Same when we landed in E. Mids.
>
> Friend: 2015.
>
> A: Yes, 2015, sorry.
>
> D: Would you be able to self propel?
>
> A: What about going uphill? I'd struggle stopping and keeping it under control.
>
> D: Do you think you'd have the strength to propel a wheelchair?
>
> [A:] No. Not comfortably. Pain is in my back.
>
> D: Where?
>
> [A:] Lower back (RH to base of spine)."

19 As noted above, the FTT decided that the claimant did not satisfy any descriptor in Schedule 3 to the ESA regulations and that regulation 35 did not apply to him. In her written statement of reasons for that decision the judge stated as follows:

> "14. The representative submitted a letter from the [claimant's] GP dated 17 January 2017. The GP said he did not feel qualified to say whether it would be advisable for [the claimant] to mobilise using a wheelchair, and suggested that an occupational therapist be contacted to assess whether [the claimant] could use a wheelchair safely.
>
> 15. The representative submitted a letter from a consultant in neuro rehabilitation dated 12 January 2017. Consultant had been asked to comment on [the claimant's] use of a wheelchair in the workplace. He said:
>
> > "I think it would be really difficult for [the claimant] to use wheelchair at workplace until he gets assessed for his wheelchair provision. As [the claimant] is planning to move to Isle of Wight in the near future as he told me on the phone as well, this assessment could be carried out at his local place as he would need to be referred back [by] the GP there to the local rehabilitation services. [The claimant] totally agrees with the suggestion".
>
> …
>
> 18. [The claimant] told the tribunal that his mobility was worsening. He said he did not know if he would have the strength to propel a manual wheelchair comfortably, and said he had pains in his lower back. He had used a wheelchair, but not on his own; a wheelchair had been made available at the airport when he travelled to Portugal in 2015, when his condition was not so bad and he was pushed by one of the airport staff.
>
> …
>
> 20. [The claimant] was asked if anyone had suggested a wheelchair to him. He said there would come a time when he would need it. He was asked whether he had had an assessment by an occupational therapist, and said he had not, but they were moving to the Isle of Wight.
>
> 21. The tribunal accepted that [the claimant] had significant difficulty walking as a consequence of his health condition, which was progressive, and which affected his lower limbs. It found that he would not be able to walk for more than 50 metre[s] without stopping. Even if it was the case that he could not mobilise on foot to that extent, the tribunal also needed to consider whether he could

reasonably use a manual wheelchair, and if so, how far he could mobilise on level ground in that wheelchair.

22. From all the evidence, the tribunal found that there was no functional impairment of [the claimant's] upper limbs, and that he could sit for an hour before having to move. Although the [claimant] said he had discomfort from his lower back, there was no particular medical condition which affected his upper body, which might prevent him from being able to propel wheelchair manually.

23. The tribunal considered whether [the claimant] could reasonably be expected to use a wheelchair. He had used one in the past, but only where another person was assisting him; there was no indication that he had used a self-propelled wheelchair. Although his condition was progressive, and [claimant] said he would eventually require wheelchair, at the time of the decision under appeal there had been no assessment for wheelchair provision. His GP suggested that an occupational therapist would need to carry out such an assessment.

24. The letter from the neuro rehabilitation doctor indicated that an assessment for wheelchair provision should be carried out locally, and [the claimant] should be referred by his local GP when he moved to the Isle of Wight in the near future. He said it would be difficult for [the claimant] to use a wheelchair at a workplace until he had been assessed. He said [the claimant] totally agreed with suggestion for a referral to the local rehabilitation services for assessment for wheelchair provision.

25. From the evidence, the tribunal was satisfied that, although no assessment had yet been carried out, it was reasonable to expect that this would be done in the near future and that both [the claimant] and his medical advisers anticipated that this next step would be taken as soon assume moved to the Isle of Wight. Given the significant and progressive nature of [the claimant's] health condition, and all the evidence available it is reasonable to expect that a suitable wheelchair would be available, and would normally be used by a person with the [claimant's] degree of disability to enhances ability to mobilise.

26. From the evidence, the tribunal found it appropriate to assess [the claimant] on the basis that it would be reasonable to expect him to use a suitable wheelchair, even though the time of the decision he had not had an assessment. It therefore found that he would not generally need to stop after mobilising for 50 metres at a reasonable pace, in order to avoid significant discomfort, and it determines that he did not meet the criteria in schedule 3 in relation to mobilising."

The decision of the Upper Tribunal

Reasons for setting aside the FTT's decision

20 The FTT obviously took great pains with this case. It is to be commended for being prepared to address the wheelchair issue head on as required by the law, in circumstances where the easy course would have been to fudge that issue and place the claimant in the support group.

21 Nevertheless, its decision cannot be allowed to stand. Even if one accepts the Tribunal's reasoning all the way to the end of the penultimate sentence of paragraph 26 (which I regret I do not, see paragraph 42 below), the final sentence of that paragraph is a *non-sequitur*.

22 It does not follow from the fact that it would be reasonable to expect a person to use a manual wheelchair, that that person can mobilise in a such a wheelchair for any particular distance on level ground without stopping in order to avoid significant discomfort or exhaustion; or that he can repeatedly do so within a reasonable timescale without experiencing significant discomfort or exhaustion.

23 In this case, the FTT concentrated on the issue of whether a manual wheelchair could reasonably be used, to the complete exclusion of the issue of how far he could mobilise (or repeatedly mobilise) in such a wheelchair without experiencing significant discomfort or exhaustion. That latter issue is one of secondary fact (although a failure to address it is an error of law) and it must therefore be decided on the evidence, in the same way as, for example, a decision about how far someone can walk.

24 I have set out the evidence in this case at such length in order to demonstrate that there was no direct evidence about how far the claimant might be able to mobilise or repeatedly mobilise in a wheelchair.

25 That will inevitably be the case where the claimant has never in fact used a manual wheelchair. Such cases therefore present particular difficulties. By contrast, disputes about the walking abilities of someone who has never walked must be extremely rare.

26 It would, of course, have been possible for the FTT to have reached a conclusion about how far the claimant could mobilise in a wheelchair by inference from other evidence.

27 The FTT's findings that the function of the claimant's upper limbs was unimpaired and that he was able to sit for a reasonable period, could have been the start of that process. Arguably findings should also have been made about the strength of the claimant's upper body as a whole because the shoulders and trunk can also be used in wheelchair propulsion. Other factors, such as weight, may also be relevant. And, it will usually also be necessary to make findings about the state of a claimant's cardio-vascular and respiratory systems, although that was not an issue in this case.

28 But, in my judgment, what was also required was a benchmark of some sort. The descriptors under Activity 1 of Schedule 2 contemplate that, in different circumstances, a claimant may be able to mobilise or repeatedly mobilise) in a wheelchair for 50 metres or less (Descriptor 1a); for more than 50 metres but no more than 100 metres (Descriptor 1c); for more than 100 metres but no more than 200 metres (Descriptor 1d); or more than 200 metres (Descriptor 1e). It cannot be the case that every claimant who can reasonably use a wheelchair is to be assumed to be able to propel it for more than 50 metres,

29 There was nothing before the FTT against which its findings about upper body functions could be compared: no evidence about how far a person with disabilities such as the claimant could normally propel (or repeatedly propel) a manual wheelchair without experiencing significant discomfort or exhaustion. Without that, and subject to paragraph 30 below, there was no evidence in this case on which the FTT could properly have made a judgment on the balance of probabilities about how far the claimant could mobilise (or repeatedly mobilise) in a manual wheelchair. Moreover in such a case, the written statement of reasons would have needed to explain how the tribunal had assessed the evidence by reference to the benchmark.

30 The information about how far the “average” wheelchair user can propel his wheelchair is not general knowledge, but it might have been within the specialist knowledge of the FTT’s medical member or disability-qualified member. However, if the FTT had been relying on the specialist knowledge of its members, the written statement of reasons should have said so.

31 As it did not do so in this case, the statement suggests that the FTT moved straight from the conclusion that this was a case in which a wheelchair could reasonably be used, to the conclusion that the claimant did not satisfy Descriptor 1 in Schedule 3. In my judgment, the evidence did not support that final step in the FTT’s reasoning.

32 I accept that the FTT did have the evidence of the claimant’s statement to the HCP that he “could propel a manual wheelchair” (see paragraph 6(a) above) and his oral evidence to the tribunal that he did not think he could do so comfortably because of the pain in his back (see paragraph 18 above). Taken together, those two statements effectively cancel each other out, and even if one takes the first on its own, it does not amount to an admission that he could propel a manual wheelchair for any particular distance. In any event, it is not clear how weight could be attached to either statement. The claimant’s evidence, which the FTT accepted, was that the he had never propelled a manual wheelchair. His initial optimism that he would be able to do and his subsequent doubts were both speculation. The truth is that he did not know whether he could do so or not, and will not know until he tries.

33 I therefore conclude that the FTT erred in law, either by making a finding of fact that was unsupported by the evidence or, if it was relying on the specialist knowledge of its members to reach its conclusion, by failing to give adequate reasons. Either error was material and I therefore exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") to set the FTT’s decision aside.

Reasons for remaking the decision

34 Having set the decision aside, I must either remit the case to the FTT with directions for its reconsideration or remake it (see section 12(2)(b) TCEA).

35 I have decided to remake the FTT's decision. The matter is now becoming old—the Secretary of State's decision was given almost 18 months ago and the FTT's almost a year ago—and the claimant's condition is progressive. He is likely to have difficulty remembering how he was at the stage the degeneration of his lower limbs had reached in August 2016, so any tribunal rehearing the case is likely to place considerable weight on the written evidence that is available to me.

36 Moreover things have moved on. The claimant has now moved to the Isle of Wight. I assume he has now had a wheelchair assessment, although I do not know what the outcome was. If it is now the case that the claimant uses a wheelchair then the Secretary of State has power to supersede my decision on the basis that there has been a relevant change in circumstances since it had effect.

37 I begin by accepting the FTT's finding that the claimant "would not be able to walk for more than 50 metres without stopping". No other conclusion is open on the evidence, and in particular the evidence of the gait analysis. I am struck by the fact that the claimant's walking speed was 20% (one fifth) of normal.

38 I must then consider whether this is a case in which a manual wheelchair could reasonably be used. Guidance on the approach to be taken to that issue was given by a three-judge panel of the Upper Tribunal in *SI v Secretary of State for Work and Pensions (ESA)* [2014] UKUT 308 (AAC), reported as [2015] AACR 5 at paragraphs 7-82:

> "76. First, because the work capability assessment is not to be divorced from the real world of work and the claimant does not actually have an employer, the test must be applied on the basis that the notional employer from whom the claimant might obtain employment has a modern workplace and is prepared to make reasonable adjustments in order to enable the claimant to be employed. To that extent the test is a thought-experiment like the "cooking test".
>
> 77. Secondly, as the Secretary of State concedes, all medical considerations will need to be taken into account. This includes "attendant consequences, for example, muscle wasting" identified by Judge Gray in *TB* which, we observe, are matters beyond the current "physical and mental condition" mentioned in section 1(4)(a) of the 2007 Act and regulation 19(1) of the ESA Regulations and the current "specific bodily disease" and "specific mental illness" mentioned in regulation 19(5). However, we draw attention to the view of the First-tier Tribunal in the second case before us that "there would not be any detriment to the appellant's health if she were to utilise a wheelchair for a significant portion of the day" because "she would still have the remaining portion of the day in which she could utilise her limbs and continue with ensuring

the circulation of blood". Also, while we agree with Judge Williams in *AR* that all aspects of wheelchair use need to be taken into account, we would point out that a person unable to get in and out of a wheelchair unaided is unlikely to need to score points under Activity 1 because he or she would probably score 15 points under Activity 2 (standing and sitting) on the ground that he or she "[c]annot move between one seated position and another seated position located next to one another without receiving physical assistance from another person".

78. Thirdly, the home environment is potentially relevant but, for the reason suggested in [74] above, an inability to use a manual wheelchair at home or to store it there due to the physical layout of the home is unlikely to be as important as was suggested in *DM* and *NT*.

79. Fourthly, the availability of manual wheelchairs is a question of fact, to be proved by evidence although the First-tier Tribunal is entitled to use its own knowledge. No Upper Tribunal judge has adopted Mr Commissioner Stockman's emphasis in *MG* on NHS assessments. Whatever may be the position in Northern Ireland, there are powerful arguments for not requiring there to be an NHS assessment before it is considered reasonable for a claimant to use a manual (or powered) wheelchair in Great Britain. This is not simply a matter of practicality, although we are inclined to agree with the Secretary of State that requiring such an assessment would be impractical, but is because such an assessment is not required by the legislation and, at least in England, the criteria for providing wheelchairs through the NHS or local authorities vary from area to area and are generally wholly unrelated to the issues raised by the ESA Regulations. No doubt any assessment would be valuable evidence, but it is not necessary to obtain one if one does not already exist. Moreover, there are other ways of obtaining manual wheelchairs. Judge Mark referred in *BG* to the "relative cheapness" of manual wheelchairs and to their availability from charities where reasonably required. They can also often be rented at a modest cost that might be met out of earnings, although this may not be possible everywhere.

80. …

81. Fifthly and more generally, it will be clear from what we have already said that it is necessary for the Secretary of State to anticipate or at least answer objections that claimants who do not use manual wheelchairs or other aids might make to being expected to consider using one. Thus reasons for decisions or submissions to the First-tier Tribunal need to show why the decision that the use of an aid is reasonable for that claimant accords with and promotes the underlying purposes of the legislation governing entitlement to ESA. They would also indicate to the claimant, those concerned with JSA and the First-tier Tribunal why it was thought that the particular

> claimant's capability for work should be assessed on the basis that he used the relevant aid or appliance. Naturally, those reasons and the manner in which they are provided will be case and aid or appliance specific. Some (eg medical issues) will appear in and can be given by the provision of or by reference to the Health Care Professional's report. Other reasoning could no doubt be based on generic and published evidence based material."

39 That advice was given on 4 July 2014, long before the dispute that led to this appeal arose. However, the Secretary of State has not even attempted to discharge the burden that is placed on him by paragraph 81 of *SI*.

40 At its highest, the case that the claimant could reasonably use a wheelchair is that he told the HCP he could do so (at a time when he had never tried) and that the function of his upper limbs and chest are unimpaired. In my judgment, that does not come close to showing "why the decision that the use of an aid is reasonable for that claimant accords with and promotes the underlying purposes of the legislation governing entitlement to ESA".

41 Moreover, although—for the reasons set out in paragraph 79 of SI—the absence of an NHS assessment does not show that a wheelchair cannot reasonably be used, the prospect of such an assessment in the near future does not show that it can. The FTT's reasoning in this case seems to me to confuse the likelihood of the assessment proceeding, which was high once the claimant had moved to the Isle of Wight, with the likelihood that the outcome of that assessment would be that he should use a wheelchair, which was more speculative. The very fact that an assessment is required implies the possibility of an outcome in which a wheelchair was judged to be unsuitable. I attach no weight either to the absence of an NHS assessment or to the probability that one will have taken place shortly after the period I am considering.

42 I therefore judge that the Secretary of State has not established that this is a case in which, in relation to the period ending on 1 August 2016, a wheelchair could reasonably have been used for the purposes of Descriptor 1 in Schedule 3 to the ESA Regulations.

43 In those circumstances, my finding that the claimant would not be able to walk for more than 50 metres without stopping means that he satisfies Descriptor 1.

44 The claimant is therefore to be included in the support group and is entitled to the support component from the fourteenth week of his entitlement to that benefit (see regulation 4(4) of the ESA Regulations and regulations 6(2)(r) and 7(38) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999).

45 I should add that, had I reached the opposite conclusion about reasonableness, I would still have remade the decision in the same terms, but on the basis that there is no evidence that would permit me to make findings of fact about how far the claimant could mobilise, or repeatedly mobilise, in the wheelchair.

Conclusion

46 For all those reasons, my decision is as set out on page 1 above.

(Signed on the original)

Richard Poynter
Judge of the Upper Tribunal

26 January 2018