IN THE UPPER TRIBUNAL **Case No.** CE/2037/2018
ADMINISTRATIVE APPEALS CHAMBER

Before **Thomas Church, Judge of the Upper Tribunal**

Decision: As the decision of the First-tier Tribunal (which it made at Leeds on 27 April 2018 under reference SC240/18/00316) involved the making of an error of law, it is set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
I am able to re-make the decision under appeal pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.
My decision is to set aside the decision maker's decision dated 20 December 2017 and to substitute it with a decision that the Appellant had good cause for his non-attendance at his appointment for a medical examination on 10 December 2017 and should not be treated as not having limited capability for work from 11 December 2017.

REASONS FOR DECISION

Background

1. This appeal relates to the Appellant's claim for Employment and Support Allowance.
2. The Appellant was invited to attend a work capability assessment which was to take place on 10 December 2017. The Appellant was invited to attend a work capability assessment (which is a medical examination for the purposes of regulation 23 of The Employment and Support Allowance Regulations 2008 (the **"ESA Regulations"**)). The appointment was to take place on 10 December 2017. However, the Appellant failed to attend.
3. Following his failure to attend the appointment the Appellant was sent a Form BF223 which he was asked to complete to explain the reason for his non-attendance at the appointment. The Appellant completed the form, explaining that he had an epileptic seizure on the day of his appointment and was therefore unable to attend.
4. A decision maker for the Respondent decided on 20 December 2017 that the Appellant had failed without good cause to attend his medical examination, having been given at least 7 days' prior notice of the appointment, and that as a consequence his award of Employment and Support Allowance should be disallowed from and including 11 December 2017, being the day after the date of the missed appointment (the **"Decision"**).
5. The Appellant requested a reconsideration of the Decision. It was reconsidered but not revised. The Appellant then appealed to the First-tier Tribunal.

Proceedings before the First-tier Tribunal

6. The appeal was considered by the First-tier Tribunal on 27 April 2018. Both parties had agreed to the matter being dealt with without an oral hearing and the Tribunal decided that it was appropriate to determine the appeal on the basis of the papers alone.
7. The Respondent opposed the appeal on the basis that:
    a. the Appellant had been unable to attend previous appointments for a medical assessment for a similar reason;

b. the Appellant had been advised that he could provide supporting evidence from his GP or a consultant neurologist outlining the difficulties he faces travelling and attending an assessment and potentially requesting that the assessment should be carried out at his home to reduce the risk of stress and therefore the risk of him having a seizure;
c. since the Appellant didn't provide any such supporting medical evidence requesting that consideration be given to a home assessment he had not taken the actions that would be deemed reasonable under the circumstances; and
d. the Appellant has therefore not shown "good cause" for not attending the appointment for the purposes of regulation 23 of the ESA Regulations.

8. The Respondent accepted in written submissions that the Appellant had a diagnosis of epilepsy and accepted that the Appellant was affected by on-going seizures. The First-tier Tribunal made no findings of fact as to whether the Appellant suffered from epilepsy or not or whether he was affected by on-going seizures or not.
9. Neither the Respondent's submissions nor the First-tier Tribunal's decision or statement of reasons suggested that the Appellant's claim that he had a seizure on the day of his appointment was untrue, and the Respondent accepted both that an epileptic seizure may be triggered by stress and that attending an assessment (or indeed the thought of travelling to the assessment centre) could be stressful for individuals (see page 1E of the First-tier Tribunal's bundle). The First-tier Tribunal's statement of reasons referred to the evidence that was before it but didn't make any findings on these matters.
10. The First-tier Tribunal found that the Appellant had been advised by the Department of Work and Pensions that stress, which might be a trigger for fits, could be greatly reduced if, with appropriate medical evidence, an application for a home visit by a healthcare professional were arranged. The First-tier Tribunal also found that the Appellant had not acted on that advice (see paragraph 7 of the statement of reasons).
11. The First-tier Tribunal then decided based on those findings that the Appellant had not acted reasonably under the circumstances and it adopted in full the reasoning set out in the Respondent's response to the appeal (which I have summarised in paragraph 7 above).
12. The Tribunal disallowed the appeal and confirmed the Decision (the **"First-tier Decision"**).
13. The Appellant applied to the First-tier Tribunal for permission to appeal the First-tier Decision to the Upper Tribunal but a District Tribunal Judge decided on 30 July 2018 that it was not appropriate either to review the First-tier Decision or to grant permission to appeal to the Upper Tribunal as no error of law was identified.
14. The Appellant made an in-time application to the Upper Tribunal for permission to appeal the First-tier Decision.

The Permission Stage

15. In his application for permission to appeal to the Upper Tribunal the Appellant set out the circumstances of his non-attendance at his appointment for a medical examination. Although he didn't point in terms to an error of law by the First-tier Tribunal in effect the grounds for his application were that the First-tier Tribunal misunderstood or misapplied the proper legal test for establishing "good cause" under regulation 23 of the ESA Regulations.

16. I decided that it was arguable, with a realistic (as opposed to fanciful) prospect of success, that the Respondent, and by extension the First-tier Tribunal in adopting the submissions of the Respondent, misunderstood and misapplied the proper test for determining "good cause" under regulation 23 of the ESA Regulations.
17. In my grant of permission I said:

> *"It is arguable that to apply a standard for "good cause" which requires the claimant to plan substantially in advance, to take the initiative to seek a home assessment, and to provide evidence sufficient to satisfy the Department for Work and Pensions that a home assessment should be agreed to, is to set the bar for the claimant too high as it is arguable that such a requirement is neither expressly stated nor implicit in the wording of Regulation 23. Given that Regulation 24 requires that "the claimant's health at the relevant time" is to be taken into account in determining whether "good cause" has been established it is arguable that the proper question to ask when considering this issue is: "what would a reasonable person do when faced with the circumstances the claimant found him or herself in on the day in question?" rather than considering what steps the claimant might have made in anticipation of the possibility of his experiencing an epileptic seizure."*

18. I asked the parties to indicate whether they wished to have an oral hearing and invited submissions on the appeal. Neither party asked for an oral hearing and I could see no compelling reason to hold one so I exercised my discretion against holding an oral hearing and decided to determine the appeal based on the papers alone.

Respondent's submissions

19. Mr. Mick Hampton, on behalf of the Respondent, indicated that the Respondent did not support the appeal and he set out some helpful written submissions explaining why. He said that if my suggestion that the issue of good cause be decided in the light of the claimant's health at the relevant time was taken to its logical conclusion it would mean that a claimant *"could cite health problems on the day in question as "good cause" for not attending any number of subsequent examinations and would be able to do so without forfeit."*
20. Mr. Hampton argued that while regulation 24 of the ESA Regulations does stipulate that certain matters should be considered when determining whether or not a claimant had "good cause", it is clear from the use of the word "include" in regulation 24 that a decision maker or tribunal may also take other relevant factors into account.
21. Mr. Hampton maintained that the process for requesting an appointment for a home visit and providing evidence to support the requirement for a home visit would not necessarily be a stressful one for all claimants, and whether imposing a requirement that the claimant take those steps is to *"set the bar for the claimant too high",* as I put it in my permission decision, is a matter that should be determined on the facts of the particular case.
22. Mr. Hampton said that it was reasonable to expect the Appellant to take advantage of the opportunity given to him by applying for a home visit (it having been explained to him that he would need supporting evidence from, for example, his GP or his consultant neurologist, in order for a home visit to be arranged). In the

circumstances, Mr. Hampton maintains, it was reasonable for *"appropriate weight"* to be given to his failure *"to avail himself of this opportunity"*.

23. Mr. Hampton said that if it was considered that the First-tier Tribunal had made sufficient findings of fact to support the decision it reached then it was entitled to make that decision for the reasons it gave and it explained its decision adequately.

Appellant's response

24. The Appellant responded to the Respondent's submissions to reiterate that he disagreed with the decision. He did not specifically address the points Mr. Hampton had made in his submissions but he denied that his seizures were stress-related, saying that he had had them since birth and it is wholly unpredictable when they will occur. He emphasized that he had fully intended to attend his appointment for a medical examination and said he had booked a taxi to take him there.

My Decision

25. Regulation 24 requires that the claimant's "state of health at the relevant time" is considered. I take this to mean the time at which the claimant was required to attend and submit to the medical examination or to provide the requested information, as the case may be. In other words, the requirement to consider the claimant's "state of health" in regulation 24(b) relates to the degree of the claimant's health problems at that time.
26. Regulation 24(c) requires the decision maker or tribunal to consider *"the nature of any disability the claimant has"*. This could include, in relation to a condition that doesn't affect the claimant all the time, the pattern of the claimant's symptoms so doesn't preclude an approach which looks beyond the day of the appointment. However, the Appellant's case, which was accepted by the decision maker and not disputed by the Tribunal, was that he experienced seizures that were unpredictable and followed no set pattern.
27. Mr. Hampton has made the point that the list set out in regulation 24 of the ESA Regulations of factors to be considered when determining whether a claimant had "good cause" for the purposes of regulation 22 or regulation 23, as the case may be, is inclusive and not exhaustive. I agree. It follows from this that a decision maker or tribunal may consider other relevant factors when deciding whether a claimant has "good cause".
28. The Respondent's position is that a relevant factor in this case was the Appellant's "failure" to request a home visit for his medical examination, despite being informed that he could apply for one.
29. The Respondent's case proceeds from the premise that it is for the claimant to decide whether a home visit is necessary and to provide evidence to show that it is. Following Mr. Hampton's logic, if the claimant "fails" to seek a home visit then no matter how unwell he or she may be on the day of the assessment, a decision maker would be entitled to decide that "good cause" was not be established notwithstanding the claimant's "state of health at the relevant time" if those circumstances could have been foreseen and arrangements made to mitigate the risk of them resulting in the appointment being missed. This seems to me to be unreasonably harsh.
30. What if the pattern of the claimant's symptoms is unpredictable, as was accepted in this case? Is it really incumbent on the claimant to make the case for a home visit? If it were wouldn't that be reflected in the regulations, especially given the severity of the consequences for a claimant? I think it would.

31. I do not agree with Mr. Hampton "floodgates" argument, that an approach to "good cause" that focuses on the claimant's health at the relevant time, and doesn't require the claimant to plan ahead taking into account the possibility that he might not be well enough on the day would, if taken to its logical conclusion, mean a claimant *"could cite health problems on the day in question as "good cause" for not attending any number of subsequent examinations and would be able to do so without forfeit".* Neither the decision maker nor the tribunal need take what a claimant says at face value. For that reason "citing" health problems isn't enough to establish "good cause". An endless series of failed appointments would only result in a claimant avoiding forfeit if the decision maker or tribunal is persuaded on each occasion that the claimant's health at the relevant time was such as to give him or her good cause for non-attendance. If a claimant is genuinely too unwell to attend a whole series of appointments for medical examinations that would tend to suggest that the claimant is someone who would be likely to qualify for Employment and Support Allowance and shouldn't, therefore, be denied the opportunity to be assessed for it.
32. If the Respondent found herself in the position Mr. Hampton posits it would of course be open to her to offer the claimant a home visit in case that would make it more likely that the appointment would be kept. That strikes me as a reasonable and proportionate approach, while an approach which denies the claimant an opportunity to be assessed, and therefore an opportunity to qualify for the benefit, if he has the misfortune to miss successive appointments due to genuine health problems strikes me as both unreasonable and disproportionate.
33. In this case the Appellant claims to have experienced a seizure on the day of the appointment for his medical examination. He says his seizures follow no set pattern and are wholly unpredictable. He says he was very unwell as a result of having his seizure and was in no fit state to attend his medical examination. None of this appears to have been disputed by the Respondent.
34. The Respondent says the Appellant should have anticipated the possibility of his having a seizure on the day of his appointment notwithstanding the lack of a pattern to his seizures. The decision maker appears to have assumed that the Appellant would have been able to keep his appointment for his medical examination had it been a home visit. Otherwise the argument that his "failure" to make arrangements for a home visit justifies dismissing the Appellant's argument for "good cause" is more difficult to maintain. However, is not clear on what basis this assumption was made. Given what the Appellant says about the effect his seizures had on him in the hours following the seizure, which the Respondent has not disputed, it seems unlikely that even a home visit would have been successful.
35. While I accept that the list set out in regulation 23 of the ESA Regulations of factors to be considered when determining whether a claimant has established "good cause" is inclusive and not exhaustive, and that therefore the decision maker and the Tribunal were entitled to consider other factors when they considered whether the Appellant had "good cause" for not attending I consider that the decision maker and the Tribunal each applied the wrong test when they assessed the Appellant's reasons for failing to attend his medical examination in making.
36. While it is not inconceivable that circumstances may arise in which it might be reasonable to expect a claimant to engage in some degree of advance planning to maximise the chances of an appointment for a medical examination being kept, such a case would be exceptional and clear and cogent reasons would have to be provided to explain why the claimant was under such an obligation in the particular

circumstances of that case. It is not reasonable to infer a general obligation on claimants to engage in a significant degree of forward planning in the absence of any express obligation being placed on them by the ESA Regulations.

37. In the present case, given that:
    a. it was accepted that the Appellant suffered from seizures which were unpredictable and followed no particular pattern,
    b. it was not disputed that the Appellant suffered a seizure on the day of his appointment, and
    c. it was not disputed that he experienced significant symptoms in the hours following his seizure on the day in question which made it impossible for him to keep his appointment,

    each of the decision maker's and the Tribunal's decision that:
    a. the Appellant did not act reasonably when he failed to act on the advice of The Department for Work and Pensions' advice in relation to home visits, and
    b. his state of health at the relevant time did not therefore amount to good cause for his failure to attend

    fell outside the range of reasonable decisions open to it on the facts it found (or, as the case may be, adopted from the Respondent) or which were not disputed.
38. This appeal to the Upper Tribunal is allowed. The First-tier Decision and the Decision were made in error of law. Each of them is set aside.
39. I replace the Decision with my decision that the Appellant had good cause for his non-attendance at the 10 December 2017 appointment for a medical examination and should not be treated as not having limited capability for work from 11 December 2017.

Signed

Thomas Church
Judge of the Upper Tribunal

Dated **04 April 2019**