

## IN THE UPPER TRIBUNAL UT Ref: UA-2021-SCO-000005-DLA ADMINISTRATIVE APPEALS CHAMBER

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

## Between:

## CS (by her appointee and mother)

- v –

## The Secretary of State for Work and Pensions

Appellant

Respondent

**Before: Upper Tribunal Judge Wright** Decision date: 3 November 2022 Decided on written submissions.

## Representation:

Appellant: The appellant was represented by Mike Dailly, Solicitor Advocate, Govan Law Centre.

Respondent: The respondent was represented by Julia Smyth of counsel, instructed by the Government Legal Department.

# DECISION

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal made on 5 May 2021 under case number SC100/20/02272 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and, with the agreement of the parties, redecide the appeal. In redeciding the appeal, I set aside the Secretary of State’s decision of 13 May 2020 and hold that the appellant is entitled to the higher rate of the mobility component of Disability Living Allowance (DLA) and the highest rate of the care component of DLA from 13 May 2020 to 12 May 2022.

# REASONS FOR DECISION

1. The parties are agreed that I should give the decision in the above terms and I am satisfied that I should do so.
2. This appeal concerns entitlement to the higher rate mobility component of Disability Living Allowance (“DLA”) via the ‘severe mental impairment route under section 73(3) of the Social Security Contributions and Benefits Act 1992 and regulation 12(5) and (6) of the Social Security (Disability Living Allowance) Regulations 1991 (“the DLA Regs”).
3. I gave permission for this appeal because I considered the ground of appeal advanced concerning the correct construction of the statutory phrase “suffers from a state of arrested development or incomplete physical development of the brain” in regulation 12(5) of the DLA Regs, and whether the First-tier Tribunal applied that test correctly under its paraphrase “stopped or incomplete development of the brain”, was arguable and merited the further attention of the Upper Tribunal.
4. I also drew attention when giving permission to appeal to the divergence of Upper Tribunal authority on the above statutory wording in *SC v SSWP* [2010] UKUT 76 (AAC) in *NMcM v SSWP* (DLA) [2014] UKUT 312 (AAC). Neither case has been reported by the Upper Tribunal and in both cases the views expressed on the correct construction of the above statutory phrase were arguably obiter.
5. I further said when giving permission to appeal that insofar as the arguments advanced on behalf of the appellant concerned ADHD satisfying the (correct) test for suffering from “arrested development or incomplete physical development of the brain”, it may have been necessary for the Upper Tribunal to address whether medical knowledge about ADHD had moved on in this regard since *CDLA/5153/1997* was decided.
6. Both parties’ legal representatives agree that *SC* was wrongly decided and that *NMcM* correctly sets out the proper legal approach to the statutory test of “suffers from a state of arrested development or incomplete physical development of the brain”. I agree with parties on this point, though nothing now turns on it for the purposes of this appeal.
7. Since permission to appeal was given both parties have sought to put forward medical evidence on whether ADHD is now accepted in the general medical community as amounting to a state of arrested development or incomplete physical development of the brain. I thank both parties for their helpful efforts in this regard. However, in circumstances where it is now agreed between the parties, and accepted by me, that (a) the First-tier Tribunal erred in law and (b) the appellant’s combination of medical conditions meets the statutory criteria in regulation 12(5) of the DLA Regs (and the appellant also satisfied the regulation 12(6) criteria at the material time), I do not consider it either necessary or appropriate for me address whether ADHD alone meets the first criterion in regulation 12(5) of the DLA Regs.
8. As we have reached the position that the appeal can be allowed on the particular circumstances of this case, and given that no wider issues about ADHD now arise on this case, there is no need to hold an oral hearing on this appeal to address those issues. I therefore set aside my earlier direction for an oral hearing to take place on this appeal.
9. I agree with the reasons put forward by the Secretary of State in his submissions of 12 October 2022 for allowing this appeal. I therefore do no more than set out the relevant parts of those submissions.

“1. The Secretary of State (“SSWP”) is grateful to the Tribunal for the extension of time to enable her to obtain, and consider, an expert report from Dr David Foreman. A copy of his report dated 30 August 2022 is attached. Based on the combination of [the appellant’s] diagnoses of Neurofibromatosis type 1 (“NF1”) and ADHD, he concludes that [the appellant] does suffer from a state of arrested development of the brain which results in severe impairment of intelligence and social functioning.

2. For the reasons set out below, SSWP submits that the appeal should be allowed…..

8. The report from Dr Foreman explains the interaction between NF1 (which can cause ADHD, as he explains) and ADHD. He sets out in section 2 of his report that: (a) NF1 affects the Central Nervous System, and causes the structural and functional brain abnormalities identified in cases of NF1; and (b) ADHD in NF1 is different from cases of ADHD without the mutation; NF1 is the cause of ADHD where ADHD and NF1 are present together. ADHD in the context of NF1 predicts worse intellectual functioning and is unlikely to remit. In those circumstances, he considers that [the appellant] does “suffer from a state of arrested development or incomplete physical development of the brain.” He adds in section 3 that ADHD without NF1 is likely to have a different pattern of brain abnormalities.

1. Dr Foreman also considers, for the reasons set out in section 4, that [the appellant’s] diagnosed conditions cause severe impairment of intelligence and social functioning. SSWP does not take issue with that conclusion on the specific facts of this case.
2. Having reviewed the report from Dr Foreman, and on reflection in relation to this appeal more generally, SSWP considers that the FTT made a material error of law in considering the statutory test by reference to NF1 and ADHD in isolation, as opposed to in combination. SSWP submits that had the FTT approached the matter on this basis, it ought, on the very exceptional facts of this case, to have taken steps in exercise of its inquisitorial function to address the correct question.

11. Based on the report from Dr Foreman, SSWP accepts that the criteria in reg. 12(5) are satisfied in [the appellant’s] case. SSWP also accepts in light of the evidence in the case more generally that [the appellant] satisfies the criteria in reg. 12(6)….

13. SSWP does not, of course, seek to address any broader issues about ADHD raised by the Tribunal’s February 2022 directions as they do not now arise on the facts of this case (and are not addressed by the medical evidence in any event, given the conclusions drawn by the expert in relation to [the appellant’s NF1).”

1. Neither party has raised any issue about the DLA award under my remade decision having already ended (on 12 May 2022) and no argument was made to me that the period of the award under appeal should run beyond 12 May 2022. I assume a renewal claim has been made for DLA for the period from 12 May 2022 and a decision has been made on that renewal claim. (It may instead have been thought sensible to suspend deciding that renewal claim until this appeal has been finally decided.) Given the evidence that has led me to make the (agreed) decision in the above terms, it would seem unlikely that any renewal decision from 12 May 2022 would properly not award the appellant the higher rate of the mobility component and highest rate of the care component of DLA, unless of course there has been a material change in the appellant’s circumstances since 13 May 2020

## Approved for issue by Stewart Wright Judge of the Upper Tribunal

On 3 November 2022