



**DECISION OF**

**LADY POOLE**

**IN AN APPEAL**

in the case of

Social Security Scotland

Appellant

- and -

JS

Respondent

FTS reference: FTS/SSC/AE/01868

Representation:

Social Security Scotland: Scottish Government Legal Directorate

JS: no appearance

23 April 2025

**DECISION**

The appeal is allowed. The decision of the First-tier Tribunal for Scotland (“FTS”) of 12 November 2024 is quashed and re-made as follows:

“The appeal against the refusal to award Adult Disability Payment is allowed. The applicant is entitled to the daily living component of Adult Disability Payment at the standard rate from 8 December 2023 to 7 December 2026. He scored 8 points under descriptors 4b, 5b, 6b and 9b in part 2 of schedule 1 of the



Disability Assistance for Working Age People (Scotland) Regulations 2022. No award is made in respect of the mobility component.”

## REASONS FOR DECISION

### Introduction and summary

1. This is an appeal about the start date of an award of Adult Disability Payment (“ADP”). It finds that the FTS erred in law because it failed properly to apply the provision which governs the start date of awards, regulation 35 of the Disability Assistance for Working Age People (Scotland) Regulations 2022 (the “ADP Regulations”). Because the award in this case was based on functional limitations as a result of a stoma operation on 8 September 2023, under the ADP Regulations, the earliest the award could start was 13 weeks after that operation.

### Background

2. The appellant (“JS”) suffers from irritable bowel syndrome and, on 8 September 2023, had an operation resulting in the fitting of a stoma bag. Prior to that, on 4 September 2023, he had telephoned Social Security Scotland (“SSS”). In that call he had provided his name, date of birth and address and requested an application form for ADP. SSS received an application form completed and signed by JS on 5 October 2023. In a decision on the application dated 1 February 2024, SSS found that JS did not qualify for ADP. It confirmed that decision in a redetermination dated 1 April 2024. SSS assessed JS as scoring 6 points for daily living activities only (in respect of descriptors 4b, 5b, and 6b in schedule 1 part 2 of the ADP Regulations) which was insufficient for an award.
3. JS appealed to the FTS. Before the FTS, additional information was provided about mental health problems associated with coping with the stoma, medication and treatment, and difficulties socialising. On 12 November 2024, the FTS found that JS scored an additional 2 points in respect of daily living activity 9b, and was therefore entitled to the daily living component of ADP. It found that a 3 year award was necessary to afford JS the opportunity to recover both physically and mentally from the procedure he had undergone. The FTS decided the award should run from 5 September 2023 to 4 September 2026.
4. SSS appealed the decision of the FTS in relation to the start date of the award only. The FTS granted permission to appeal on 7 January 2025 on the following ground of appeal:

“The FTS has misdirected itself in law as to the effect of regulation 35 of the ADP Regulations and so has erred in its conclusion as to the date on which the appellant’s entitlement to assistance begins”.



5. The appeal has not been opposed and it is fair and just to determine it on the papers.

## Governing law

6. Regulation 35 of the ADP Regulations is entitled “When an application is to be treated as made and beginning of entitlement to assistance” and provides:

“(1) An application for Adult Disability Payment is to be treated as made—

- (a) on the day it is received by the Scottish Ministers, or
- (b) if applicable, on the day identified by the Scottish Ministers in accordance with paragraph (2).

(2) If, before making a determination on the basis of an application, the Scottish Ministers consider that the individual in respect of whom the application is made—

(a) would not satisfy a requirement in—

- (i) regulation 5 (daily living component),
- (ii) regulation 6 (mobility component),
- (iii) regulation 11 (required period condition: daily living component),
- (iv) regulation 12 (required period condition: mobility component),
- (v) Part 5 (residence and presence conditions), or
- (vi) regulation 22 (age criteria),

if the application were treated as made on the day it was received, and

(b) would likely be entitled to receive Adult Disability Payment if those requirements were satisfied within a 13-week period beginning on the day it was received, the Scottish Ministers may choose the date within that 13 week period on which the application is to be treated as made.

(3) Where, on the basis of an application (other than where regulation 58(1) applies), a determination is made that an individual is entitled to Adult Disability Payment, the date on which entitlement begins is to be identified in accordance with paragraphs (4) to (6).

(4) Where an application is made within 8 weeks of the day on which the full name and date of birth of an individual (“the required data”) is submitted by, or on behalf of, the individual to the Scottish Ministers for the purpose of an application for Adult Disability Payment, entitlement begins on whichever is the later of the day—

- (a) on which the required data was submitted, or
- (b) identified in accordance with paragraph (2).

(5) Subject to paragraph (6), where an application is made after the 8 week period described in paragraph (4), entitlement begins on the day on which the application is treated as made in accordance with paragraph (1).



(6) Where the Scottish Ministers are satisfied that there is a good reason why an application was made after the 8 week period described in paragraph (4), they may treat the application as having been made within that period.

(7) For the purposes of section 38(3) of the 2018 Act, the period covered by an application for Adult Disability Payment—

(a) under paragraph (1)(a)—

(i) begins on the day on which the application is treated as having been made, and

(ii) ends on the day on which the determination of entitlement is made, and

(b) under paragraph (1)(b)—

(i) is deemed to begin on the day before the determination of entitlement is made provided that the requirements are satisfied, and

(ii) ends on the day on which the determination of entitlement is made.”

7. One of the conditions for entitlement to ADP under regulations 3, 5 and 6 of the ADP Regulations is the required period condition. Under regulations 11 and 12, an individual meets the required period condition for the daily living and mobility components of ADP where, if the individual's ability to carry out the daily living and/or mobility activities were determined every day in the required period, it is likely that the Scottish Ministers would determine on all of those days that the individual had limited or, as the case may be, severely limited ability to carry out the daily and/or mobility living activities. Under regulation 10(3),

““required period” means —

(a) where an individual's entitlement to Adult Disability Payment falls to be determined, the period of 13 weeks ending with the relevant date together with—

(i) in relation to an application after an interval (see regulations 14 and 23), the period of 39 weeks beginning with the date on which that application is made,

(ii) in relation to any other application, the period of 39 weeks beginning with the day after the relevant date.

(b) where Adult Disability Payment has been awarded to an individual—

(i) during the period of 13 weeks following a determination of entitlement in the circumstances where regulation 14 or 23 applies, the period of 13 weeks ending with the relevant date together with, for each day of the award, the period of 39 weeks beginning with the day after each day of the award,



(ii) in any other case, for each day of the award, the period of 13 weeks ending with that day of the award together with the period of 39 weeks beginning with the day after that date”.

8. Regulation 13 of the ADP Regulations states:

“Except where regulation 14 or 23 applies, in these Regulations, the "relevant date" is—

(a) where the individual has made an application for Adult Disability Payment which has not been determined—

(i) the date of that application, or

(ii) if later, the earliest date in relation to which, if the individual's ability to carry out daily living activities or, as the case may be, mobility activities, had been determined on every day in the previous 13 weeks, it is likely that the Scottish Ministers would have determined on all of those days that the individual has limited ability or, as the case may be, severely limited ability to carry out those activities, and

(b) where the individual has an award of either or both components, each day of that award”.

## Decision

9. The FTS does not explain in its reasons why it selected the start date for the award of ADP of 5 September 2023. It is possible that it was as a result of an oral submission to it by the presenting officer from SSS, based on an error about the date the appellant first telephoned SSS. Nevertheless, since the points awarded by the FTS were based on the consequences of a stoma operation on 8 September 2023, a start date for ADP earlier than that operation appears unlikely to be correct.
10. What the FTS should have done was apply regulation 35 of the ADP Regulations to determine the correct start date for the award it decided to make. As the UTS has already commented, it is unfortunate regulation 35 is difficult to understand and apply (*Social Security Scotland v GK* 2024 UT 71 para 4). But that does not absolve the FTS from the requirement to use its terms to decide the commencement of an award.
11. The starting point, because the present claim is based on an application, is regulation 35(3), which provides that the date on which entitlement begins is to be identified in accordance with regulations 35(4), (5) and (6). Because SSS received JS's fully completed application form on 5 October 2023, which was within 8 weeks of the day JS first contacted ADP and gave his full name and date of birth, the applicable provision is regulation 35(4). Regulation 35(4) gives two possible options for the starting date. If the



dates of those two options are different, the FTS on the wording of the subsection cannot just pick whichever date it prefers, but must choose the later of the two dates.

12. The first possible option for the start date of the award is the date on which the required data was submitted. The “required data” are defined within regulation 35(4) and are in essence the full name and date of birth. JS provided his full name and date of birth to SSS for the purposes of an application for ADP on 4 September 2023.
13. The second possible option for the commencement of the award is a day “(b) identified in accordance with paragraph (2)”. Regulation 35(2) aims to give some flexibility where an appellant would not satisfy all of the conditions of ADP on the date SSS received an application, but might come to satisfy them within a 13 week period after that.
14. One of the conditions to qualify for ADP is the “required period” condition. It is not enough only to score sufficient points for an award; regulations 5 and 6 also have the effect that the required period condition must also be met. The required period is essentially a one year period, with start and end dates calculated in accordance with the ADP Regulations. Essentially there is a “backwards” test and a “forwards” test. The backwards test, paraphrased and simplified, means that the limitations on ability which score enough points for an award must have existed for 13 weeks prior to the date an award starts. The forwards test means that the relevant limitations must persist for at least 39 weeks after an award starts. The reason the required period condition exists is to ensure ADP awards are channeled towards impairments with significant and not short-term effects (*Social Security Scotland v FK 2024 UT 23* paras 1 and 16). Given that the underlying medical event giving rise to limitations on ability was based on a stoma operation on 8 September 2023, the earliest date the required period condition could have been met was 13 weeks after that operation, or 8 December 2023.
15. Of the two possible options for start dates under regulation 35(4) in this case, 4 September 2023 and 8 December 2023, the later date must be selected as the start date of the award. The FTS therefore erred in selecting 5 September 2023 as the commencement date for the award. Its decision was made in error of law, because it failed properly to apply regulation 35 of the ADP regulations.

## Outcome

16. The only challenge to the decision of the FTS in this appeal concerns the dates of the award. There is no challenge to the finding of the FTS that JS scored sufficient points under descriptors 4b, 5b, 6b and 9b in part 2 of schedule 1 of the ADP Regulations to qualify for the daily living component of ADP at the standard rate, but not the mobility component. Nor is there a challenge to the express finding of the FTS that the award should be made for a three year period. In those circumstances, rather than remitting the



case to the FTS for reconsideration, it is appropriate under section 47 of the Tribunals (Scotland) Act 2014 to quash the decision and re-make it, in the terms set out at the start of this decision. The award of the daily living component of ADP remains, based on the facts found and conclusions reached by the FTS, as does the three year period for an award, but the commencement date is altered properly to reflect regulation 35 of the ADP Regulations.

## Observation

17. This is not the only case before the UTS in which dates of an award made by the FTS have been challenged by SSS. Parties have an obligation under rule 2(4) of the First-tier Tribunal for Scotland Social Security Chamber Rules of Procedure 2018 (“**the FTS Rules**”) to help the FTS to further the overriding objective of dealing with cases fairly and justly. Given that obligation, it would be of assistance to the FTS if SSS provided information enabling the FTS properly to apply the provisions of regulation 35, should it decide to make an award of ADP. That is so even if SSS’s primary position is opposition to an appeal.
18. Information of assistance to the FTS might include:
  - (i) the date on which SSS was given the full name and date of birth of an individual in connection with a claim for ADP (the “required data” within regulation 35(4))
  - (ii) the date when SSS received the application for ADP
  - (iii) the date on which SSS considers an award of ADP ought to commence, should the FTS decide an award is warranted, upon application of the provisions of regulation 35
  - (iv) any other matters that SSS considers relevant to the dates of any award made.
19. SSS ordinarily provides a written appeal response where it is a party to an appeal before the FTS. SSS has indicated to the UTS that it is reviewing its templates for appeal responses, and will take into account guidance given by the UTS. It is likely that in due course information to enable the FTS properly to apply regulation 35 will be included in appeal responses. However, there will inevitably be a transition period, because there are many appeals where responses have already been lodged with the FTS. Meantime, if there is an oral hearing at which there is a presenting officer, the necessary information can be provided orally.

Lady Poole  
23 April 2025





*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*