

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 24 October 2017

FINAL DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. On 17 December 2018 I set aside the decision of the appeal tribunal dated 24 October 2017. Rather than remit the appeal to a new tribunal, I indicated that I proposed to decide the appeal myself.

Question for determination

2. The question in the appeal derives from regulation 23 of the Employment and Support Allowance Regulations (NI) 2008. This provides:

23.—(1) Where it falls to be determined whether a claimant has limited capability for work, that claimant may be called by or on behalf of a health care professional approved by the Department to attend for a medical examination.

(2) Subject to paragraph (3), where a claimant fails without good cause to attend for or to submit to an examination mentioned in paragraph (1), the claimant is to be treated as not having limited capability for work.

(3) Paragraph (2) does not apply unless—

(a) written notice of the date, time and place for the examination was sent to the claimant at least 7 days in advance; or

(b) that claimant agreed to accept a shorter period of notice whether given in writing or otherwise.

3. Regulation 24 spells out three matters that must be taken into account when assessing good cause, but the use of the word “include” indicates that other routes to demonstrating “good cause” are not precluded.

24. The matters to be taken into account in determining whether a claimant has good cause under regulation 22 or 23 include—

(a) whether the claimant was outside Northern Ireland at the relevant time;

(b) the claimant’s state of health at the relevant time; and

(c) the nature of any disability the claimant has.

4. It was not in dispute that the appellant had been called by the Department to attend for a medical examination in accordance with regulation 23. It was not in dispute that the appellant did not attend the medical examination. The sole issue for determination was whether the appellant had good cause for not attending. In such cases, the onus falls on the appellant to establish good cause (see paragraph 7 of R(IB)2/01 - a reported decision of Great Britain Social Security Commissioner Rowland).

Evidence

5. I issued a direction to the appellant dated 20 December 2018 requesting him to provide evidence and to make submissions which would tend to establish good cause for his failure to attend the medical examination on 23 August 2016.
6. The appellant’s initial response was received on 8 January 2019. That response did not address the request in the direction of 20 December 2018. It was shared with the Department who had no comments to make.
7. On 12 January 2019, the appellant was afforded a further opportunity to address the issues raised in the direction of 20 December 2018. The appellant engaged in further correspondence resulting in a clarification of the terms of the direction of 20 December 2018 being issued by the Legal Officer to the Commissioners on 27 February 2019. The appellant made a further submission on 5 March 2019. These were shared with the Department who made no further comment.
8. The appellant submitted that in August 2016 he was receiving the standard amount of ESA less a weekly sum of £3.70 for rent arrears. Payments were made fortnightly in arrears.
9. He stated that his utilities, including gas and electricity, were all paid for on a pay-as-you-go basis.

10. He stated that he had hire purchase commitments to meet on a monthly basis or face a £5 penalty for late payment.
11. He stated that, because of his health issues, he had a diet plan to meet and that inability to follow the diet plan led to his health suffering.
12. He stated that finding money to travel to Ballymena or Belfast was beyond his budget and that he had no option of borrowing money.
13. He indicated that he had requested medical support services for a travel voucher but had been told that they did not provide them, whereas he had been previously told when in receipt of jobseekers allowance that such vouchers were available for travel to interviews.
14. He indicated that “in better financial times” he had made the journey from his home to Belfast and Ballymena. He described the effect of walking to the bus stop or train station and then to the Assessment Centre and the return journey as leading to pain and exhaustion for days to follow.
15. He submitted that the Department had done nothing to make the process of assessment possible for him.
16. I observe that further evidence in the appeal papers indicates that the appellant was suffering from joint pains and shortness of breath due to chronic obstructive pulmonary disease (COPD), asthma, osteoarthritis and diabetes.
17. When asked why he had not attended the medical assessment the appellant had emphasised physical problems travelling to the assessment centre and that he had repeatedly requested but had been refused a visit to his home for an assessment. He had set out a chronology of travel time to the assessment centre involving a 15 minute walk to the bus stop, a 65 minute bus journey, a 20 minute walk to the assessment centre and return travel, taking up to 260 minutes.
18. An ESA113 pro forma dated 4 March 2016 from the appellant’s GP practice was among the evidence. This gave no details of his conditions. It indicated that nothing was known about the appellant’s difficulties with scheduled ESA activities. It stated that the appellant would have capacity to travel to an examination centre by public transport or taxi.
19. The ESA113 had been issued by the Department to a different medical practice and it appeared that the appellant had recently changed doctors. A further letter dated 20 May 2016 reported that the appellant had stated his inability to attend a medical examination due to his COPD, diabetes, asthma and pain in his joints from osteoarthritis. However, it gave no independent view as to whether those conditions would have led to inability to attend an examination.

Assessment and conclusions

20. The appellant firstly relies on his medical conditions as establishing good cause for non-attendance. The medical evidence on this question is inconclusive. In particular, the ESA113 indicates that the appellant could travel to an assessment by public transport or taxi. A claimant may well be able to travel by taxi but not by public transport. The question of whether the particular appellant was stated to be able to travel by public transport was not necessarily addressed. The GP letter of 20 May 2016 is equally inconclusive, as it merely reports the appellant's view of the situation without further comment or opinion.
21. The appellant reports the difficulties that he would encounter in travelling and, in light of his diagnosed conditions, some weight has to be given to his assertions. In particular, he indicates that his health would be affected by the prolonged period of travelling and waiting, resulting in pain and exhaustion. While it may be the case that he could travel to the examination venue, the effects on him are a material consideration.
22. The issue raised by the appellant that led to the tribunal decision being set aside was the financial aspect of good cause. Specifically, the appellant submits that he does not have the money to pay for travel from his home in Larne to the assessment centre in Ballymena (or Belfast). He submits that he had requested a travel voucher which would give him his travel expenses in advance of travel. However, he states that he was told that this was not available.
23. I directed the Department to provide me with copies of the documents sent to a claimant in the position of the appellant. These confirmed that a claimant is informed that he can claim travel expenses. However, it is made clear that travel expenses will not be paid in advance and that they will be reimbursed only after the date of the examination.
24. In considering the issue of whether the appellant had good cause for not attending the medical examination, I am mindful that the onus is generally seen as falling on the appellant. However, I am also cognisant of the jurisprudence such as *Kerr v Department for Social Development* [2004] UKHL 23 which indicates that the process of benefit adjudication is a cooperative process in which the claimant and the Department both play a part.
25. Neither the appellant nor the Department has submitted evidence to me of the actual cost to the appellant of attending the medical examination at the date in question. However, I take judicial notice of the cost of public transport from the appellant's home to the examination venue. Depending on the time of travel, as fares are lower after 9.30am, it would represent a proportion of roughly between 9% and 13% of the appellant's weekly rate of ESA. It appears to me that this is a significant proportion of the appellant's income, which is already low and subject to deductions

for rent arrears. The appellant has given evidence of existing financial commitments and requires to pay for utilities as he needs them.

26. Whereas the expense of travelling to the examination centre may well be met in arrears by the Department, it appears to me that it is not reasonable to expect the particular appellant to have to disburse these in advance out of his own resources. I accept that he had good cause for not attending the medical examination on 23 August 2016.

27. I allow his appeal.

(signed): O Stockman

Commissioner

16 July 2019