

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 18 January 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 18 January 2018 is in error of law. The error of law identified will be explained in more detail below. I would ask the Legally Qualified Panel Member (LQPM) to note that the Department has conceded that there was an element of confusion about the form and extent of authority for an appointee to act on behalf of the appellant in this case and that certain information relating to the issue of authority may not have been before the appeal tribunal. To that extent, therefore, the appeal tribunal's error may have been inadvertent.
2. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against. I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.
4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his entitlement to

Employment and Support Allowance (ESA) remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

Background

5. On 7 July 2017 a decision maker of the Department superseded an earlier decision of the Department, itself dated 21 May 2016 and which had awarded the appellant an entitlement to ESA from and including 21 May 2016. The supersession decision of 7 July 2017 removed entitlement to ESA from 8 June 2017. The basis for the supersession decision was an earlier determination also dated 7 July 2017 which determined that the appellant had not shown good cause for a failure to attend a medical examination in connection with his ongoing entitlement to ESA and, as result, was treated as having limited capability for work.
6. Following a request to that effect, the decision dated 7 July 2017 was reconsidered on 21 September 2017 but was not changed. An appeal against the decision dated 7 July 2017 was received in the Department on 13 October 2017.
7. The appeal tribunal hearing took place on 18 January 2018. On 1 December 2017 Form REG2(i)d had been received in the Appeals Service (TAS). The relevant form had been completed and signed by the appellant on 7 December 2017. The appellant had indicated that he was content for the appeal to proceed without an oral hearing. On 9 January 2018 a Legally Qualified Panel Member (LQPM) determined that the appeal should proceed on the papers alone.
8. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 7 July 2017.
9. On 30 April 2018 an application for leave to appeal to the Social Security Commissioners was received in TAS. On 4 May 2018 the application for leave to appeal was refused by the LQPM.

Proceedings before the Social Security Commissioner

10. On 31 May 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 11 June 2018 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 19 June 2018 Mr Collins, for DMS, supported the application for leave to appeal. Written observations were shared with the appellant and his appointee on 23 July 2018. On 29 July 2018 email correspondence was received from the appellant's appointee.
11. On 3 December 2018 I granted leave to appeal. When granting leave to appeal I gave as a reason that the grounds of appeal, are set out in the

application for leave to appeal, were arguable. On the same date I directed that an oral hearing of the appeal would not be required.

Errors of law

12. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
13. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

- “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
- (ii) failing to give reasons or any adequate reasons for findings on material matters;
- (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) giving weight to immaterial matters;
- (v) making a material misdirection of law on any material matter;
- (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

Analysis

14. In his written observations on the application for leave to appeal, Mr Collins made the following submissions:

‘The question for the Tribunal to decide was whether the Department’s decision of 07 July 2017 which superseded and removed (the appellant’s) award of ESA from and including 08 June 2017 was correct. The Department had concluded that (the appellant) had failed without

good cause to attend or submit to a medical examination (as per Regulation 24 of the Employment and Support Allowance Regulations (Northern Ireland) 2008. The tribunal concluded that the decision of 07 July 2017 was correct and disallowed (the appellant's) appeal.

(The appellant's) sister, Mrs McE, states the decision is wrong as she did not know about her brother's appointment. She also states her brother is a chronic alcoholic who dumps or destroys any letters he receives and will not go to appointments on his own.

In making this contention Mrs McE is reiterating her initial application for leave to appeal, received in The Appeals Service on 30 April 2018. She stated that she visited (the appellant) on a regular basis but because there were no letters or paperwork available from the Department she did not know about them. (She stated her brother was a chronic alcoholic who either destroys letters without opening them or throws them in the bin). Mrs McE also refers to having applied to become (the appellant's) appointee and refers to a "Registered Power of Attorney" form which she included with her application and which she stated she had given to a benefits advisor who interviewed both of them. In addition she stated that *"The Social Security Office will now send all their correspondence relating to (the appellant's) benefit to my home address so that.....I will make certain to act on their instructions."*

On 14 June 2018 I contacted ESA branch to try and establish the position regarding an appointee in relation to (the appellant's) ESA claim. I have been advised that Departmental computer records hold details of a phone call with Mrs EMcE where the call handler noted her as appointee and that a form BF56 is held. (This is the form used to apply to become an appointee.)

In the statement of reasons from the tribunal hearing on 18 January 2018 the following is recorded:-

"Subsequent to the decision of the tribunal, the Appellant's sister Mrs EMcE wrote to The Appeals Service as "my brother's attorney" requesting this Statement of Reasons. She attached a document dated 2nd of February 2018 which appears to be an authority in the standard format required by The Appeals Service to enable a person to act on behalf of an Appellant. It is not a

Power of Attorney, nor indeed does it make Mrs McE the Appellant's appointee for general benefits purposes."

As far as I can ascertain the document referred to in the above extract is a standard "Form of Authority" from the Appeals Service signed by (the appellant) on 02 February 2018 and giving consent for his sister to act for him on a range of issues associated with his appeal.

Also included in the case papers is a form "Enduring Power of Attorney" signed by (the appellant) on 26 February 2017 and witnessed by his sister and subsequently date-stamped as being received in the Office of Care and Protection on 17 October 2017. On this form (the appellant) has appointed EMcE to be his attorney to act on his behalf in relation to all his property and affairs. It does not appear that this form was before the tribunal on 18 January 2018 although it was included with the subsequent application for leave to appeal.

In its reasons at paragraphs 4-11 the tribunal considers the circumstances surrounding (the appellant's) non-attendance at the medical examination and in paragraph 11 reaches the following conclusion:-

"The tribunal also took into account the fact that at the date of the decision the appellant had not nominated an appointee, despite his alleged difficulties and also despite the fact that it appears that he had on at least one previous occasion failed to attend for assessment and therefore he and/or his family members should have been particularly aware of the need to attend or to provide a timely explanation if he was unable to do so."

Given the contents of Mrs McE's application for leave to appeal I would submit that it is questionable if (the appellant) would have paid any heed, let alone been "particularly aware" of a need to attend or alternatively provide an explanation for non-attendance. I would also submit that the "Power of Attorney" form is evidence that at the date of the Department's decision (07 July 2017) matters had been taken in hand for Mrs McE to try and manage (the appellant's) ESA claim in a way that would be to his benefit.

I would also submit that events after the tribunal's decision, in particular the fact that (the appellant) was placed in the Support Group (and without being examined) so soon after the Department's decision to disallow him gives credence to the seriousness of his condition (the tribunal at paragraph 10 had referred to the lack of evidence of the "extent" of his problem) and is broadly supportive of Mrs McE's contentions on his behalf.

Therefore while I accept that this information was not before the tribunal, had it been so I submit that the tribunal may have had a different perspective which might well have favoured (the appellant). Consequently I would support (the appellant's) application for leave to appeal.

Conclusions

In the light of my comments above I would ask the Commissioner to consider whether the tribunal inadvertently erred in law on 18 January 2018. Consequently I would support (the appellant's) application for leave to appeal to the Commissioner. I consent to the Commissioner treating the application as an appeal and determining any question arising on the application as if it arose on appeal. These observations may be treated as observations under Regulation 18(1) of the Social Security Commissioners (Procedure) Regulations (Northern Ireland) 1999.'

15. I agree with this carefully-prepared analysis and for the reasons which he has set out agree that the decision of the appeal tribunal is in error of law.

Disposal

16. The decision of the appeal tribunal dated 18 January 2018 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against. I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
17. The decision under appeal is a decision of the Department dated 7 July 2017 in which a superseded an earlier decision of the Department, itself dated 21 May 2016 and which had awarded the appellant an entitlement to ESA from and including 21 May 2016. The supersession decision of 7 July 2017 removed entitlement to ESA from 8 June 2017. The basis for

the supersession decision was an earlier determination also dated 7 July 2017 which determined that the appellant had not shown good cause for a failure to attend a medical examination in connection with his ongoing entitlement to ESA and, as result, was treated as having limited capability for work.

18. In his written observations on the application for leave to appeal, Mr Collins has stated that he had been advised that the appellant had submitted a fresh claim to ESA and which had awarded an entitlement to ESA from and including 15 July 2017. Accordingly, the jurisdiction of the appeal tribunal to which this appeal is remitted is confined to the period from 21 May 2016 to 14 July 2017.
19. It will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal and it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed): K Mullan

Chief Commissioner

27 February 2019