

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 6 August 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Newry.
2. An oral hearing of the application has been requested. However, I consider that the proceedings can properly be determined without an oral hearing.
3. For the reasons I give below, I grant leave to appeal. I allow the appeal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

4. The applicant had been in receipt of employment and support allowance (ESA) from the Department for Communities (the Department) from 18 October 2017 by reason of depression and stress. v On 30 November 2017 the applicant completed and returned an ESA50 questionnaire to the Department regarding her ability to perform various activities. On 23 February 2018 a health care professional (HCP) examined the applicant on behalf of the Department. On 12 March 2018 the Department considered all the evidence and determined that the applicant did not have limited capability for work and made a decision superseding and disallowing the applicant's award of ESA. The applicant requested a

reconsideration, submitting a letter from her general practitioner (GP). The decision was reconsidered but not revised. The applicant appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 6 August 2018. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 19 December 2018. The applicant applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was refused by a determination issued on 12 March 2019.
6. On 27 March 2019 the applicant applied for leave to appeal from a Social Security Commissioner. On 23 March 2020 her file was passed to a Social Security Commissioner for a decision. It is not evident to me why such a lengthy delay should have occurred in progressing the applicant's case and I wish to convey my regrets to her that she has been made to wait so long for a determination

Grounds

7. The applicant submits that the tribunal has erred in law on the basis of various personal circumstances that she describes and that it erred in understanding her treatment for anxiety - referring to her medication as Buscopan when it should have referred to it as Buspirone.
8. The Department was invited to make observations on the appellant's grounds. Mr Collins of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had erred in law – but insufficiently to vitiate its decision. He indicated that the Department did not support the application.

The tribunal's decision

9. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, which included a copy of the ESA50 self-assessment questionnaire, the ESA85 HCP report and a letter from the applicant's GP. The applicant attended the hearing of the appeal and gave oral evidence, represented by Mr Kerr. The tribunal was given a copy of the applicant's medical records at the hearing. The disputed descriptors were within activities 11, 14, 15 and 16.
10. While the applicant reported physical health problems with asthma and a left shoulder problem, the main conditions affecting the applicant were post-natal depression and stress. The tribunal accepted that the applicant had some mental health problems, but noted that the applicant had returned to work part-time as a medical receptionist on the permitted work scheme, working 12 hours per week over two days. She drove 10 minutes to work each day. She was the main carer for two young children.

11. On the applicant's own evidence at the hearing, she had no difficulty with activity 11. The tribunal accepted that she would have difficulties getting to an unfamiliar place unaccompanied, awarding 6 points for 15(c). However, noting her employment and that she was caring for two children, it did not accept that she was unable to cope with changes. It also found that an important part of her job would be engaging with other people. It placed weight on an entry in the GP records dated 5 February 2018 that it recorded as "she feels better at work". The tribunal awarded 6 points on this basis, which was insufficient to allow the appeal.

Relevant legislation

12. ESA was established under the provisions of the Welfare Reform Act (NI) 2007 (the 2007 Act). The core rules of entitlement were set out at sections 1 and 8 of the 2007 Act. These provide for an allowance to be payable if the claimant satisfies the condition that he or she has limited capability for work. The Employment and Support Allowance Regulations (NI) 2008 (the ESA Regulations) provide for a specific test of limited capability for work. In particular, regulation 19(2) provides for a limited capability for work assessment as an assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 of the ESA Regulations, or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

Assessment

13. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
14. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
15. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
16. The applicant submits that the tribunal made an error of fact regarding medication for her anxiety. In the record of proceedings it can be seen that the medical member "points out that she is not on medication for panic", to which it is recorded that she replied, "She says she is on Buscopan. She is on it for a good few months now..." The applicant points out that Buscopan is in fact a stomach tablet and that she was never on it, but that she is prescribed a high dose of Buspirone, which is an anxiety tablet.

17. The statement of reasons contains the statement “we cannot ignore comments such as “she feels better at work” as indicated in the General Practitioner records on 5.02.18”. It can also be seen from the record of proceedings that, when the applicant says that she is “trying to push myself by doing 12 hours”, the medical member “points out that there is a note that she enjoys work”. The applicant responds that she does not want to give it up, and is recorded as saying that she “feels it is very difficult now. She does not sleep. She has a constant sick feeling”. The actual note of a telephone encounter of 20 April 2018 says “she enjoys her job but is finding it increasingly hard”.
18. The entry in the medical records for 5 February 2018 reads:

“back at work since 10th January – working 12 hours a week – bad day on Friday – was at ESA at lunchtime on Friday – crying ++ - getting upset by small things – needs cert for ESA to say not yet fit for full time work. Doesn’t want to lose her job as feels she is better at work – employers ok about this – still poor sleep due to children but they are small at present – worried about concentration. Will issue cert – to make an apt for follow up if remains anxious and weepy”.
19. For the Department, Mr Collins submitted that the tribunal had made an erroneous reference to Buscopan. However, he submitted that it was evident that the tribunal was satisfied that the applicant experienced mental health problems and that no material error of law had resulted. While he observed that the tribunal had awarded 6 points for the activity of “Getting about”, he submitted that the tribunal had not explored this aspect sufficiently and questioned the award of points. As this was not going to affect the outcome of the appeal, he again submitted that it was not a material error of law.
20. I agree that the reference to Buscopan would appear to be a slip and was intended to be a reference to Buspirone. However, the record of proceedings does not make any express reference to medication for anxiety and therefore does not expressly correct the erroneous assumption of the medical member that she is “not on medication for panic”. At the same time, whereas symptoms of anxiety appear to have arisen before the date of the decision under appeal, Buspirone was not prescribed until after that date. Nevertheless, I observe that the applicant feels a sense of injustice over what reasonably appears to her to be an error of fact in the tribunal’s decision.
21. It appears to me that the principal basis of the tribunal’s decision was the fact that the applicant was working two days per week on the permitted work scheme. She had returned to work on 10 January 2018 and the date of the decision under appeal was 12 March 2018. The letter of her GP stated “we do not feel that she could work any more than the 12

hours currently allowed". The applicant had reported difficulties with working even these reduced hours. However, the tribunal placed weight on the applicant having worked these reduced hours for the eight or so weeks to the date of decision.

22. As noted, it had been put to the applicant by the medical member that she enjoyed work, without reference to the qualification that she was finding it increasingly hard. The applicant submits that the tribunal erred in making findings such as "she feels better at work", whereas the documentary evidence actually stated "she feels she is better at work". I accept that these are two different things. The first indicates an improvement in condition in the workplace. The second indicates a more nuanced hope that being at work may help her in the long run.
23. It seems to me that a salient issue is whether the tribunal was entitled to place so much weight on the ability of the applicant to undertake permitted work. By regulation 40 of the ESA Regulations, a claimant who works is to be treated as not entitled to ESA. By regulation 40(2)(f) there is an exception in the case of permitted work. It seems to me that it is correct in principle to adduce evidence about the duties involved in such work to consider how they might read across into the Scheduled activities.
24. However, the applicant in the present case emphasised that she had difficulty in some aspects of her work. In rejecting her oral evidence of those difficulties, the tribunal appeared to misunderstand two aspects of the evidence before it. Firstly, it appeared to understand that she enjoyed her job without qualification, whereas she had said she enjoyed it but was finding it increasingly hard. Secondly, it appeared to understand that she felt better when she was at work, whereas she had said that she felt it was better for her to be at work. I am troubled by these inconsistencies in the light of the importance which the tribunal placed on the fact of the applicant doing permitted work. I am also troubled in the light of the fact that the applicant had only been doing the permitted work for a matter of 8 weeks at the date of the decision under appeal.
25. In the particular circumstances of the case, I grant leave to appeal. I allow the appeal and set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

29 June 2020