IG-C-v-Department for Communities (ESA) [2021] NICom 39

Decision No: C4/21-22(ESA)

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 24 November 2020

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference DG/5001/20/51/P.

2. An oral hearing of the application has not been requested. However, I consider that the proceedings can properly be decided without an oral hearing.

3. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(a) of the Social Security (NI) Order 1998. Without making further findings of fact I make the decision that the tribunal should have made.

4. I decide that the appellant is not to be treated as not having limited capability for work from and including 5 March 2019 on the basis of failing to attend a medical examination on 4 March 2019.

REASONS

Background

5. The applicant had been in receipt of employment and support allowance (ESA) from the Department for Communities (the Department) from 3 June 2015 by reason of fibromyalgia. On 20 February 2019 the applicant was advised by the Department of a requirement to attend an appointment with a health care professional (HCP) on 4 March 2019.

She did not attend. On 5 March 2019 the Department issued a BF223 form to ask her reasons for non-attendance. She did not respond. On 20 March 2019 the Department made a decision that the applicant had not shown good cause for failing to attend the examination. It treated her as not having limited capability for work, superseding and disallowing the applicant's award of ESA from 5 March 2019. The applicant requested a reconsideration. The decision was reconsidered by the Department but not revised. She appealed, but waived her right to an oral hearing of the appeal.

6. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 24 November 2020. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 13 January 2021, and reissued on 10 March 2021. The applicant applied to the LQM for leave to appeal from the decision of the appeal tribunal, erroneously sending her application to the Office of the Social Security Commissioner on 8 April 2021. The application was redirected and accepted late, but leave to appeal was refused by the LQM in a determination issued on 4 May 2021. On 10 June 2021 the applicant applied for leave to appeal from a Social Security Commissioner.

7. The application was received after the expiry of the relevant statutory time limit. However, on 18 August 2021 the Chief Social Security Commission admitted the late appeal for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

8. The applicant submits that the tribunal has erred in law on the basis that she had failed to attend the medical examination due to illness and had subsequently attended an examination, at which she had been found unfit for work.

9. The Department was invited to make observations on the appellant's grounds. Mr Kirk of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application on the grounds advanced by the applicant.

10. However, he made reference to a decision of the Upper Tribunal in the case of *PPE v Secretary of State for Work and Pensions* [2020] UKUT 59. Under the reasoning in that case, he submitted that the wording of the standard letter issued to the applicant did not impose a legal requirement to attend the medical examination. He indicated that the Department supported the application on grounds different to those advanced by the applicant.

11. I grant leave to appeal on the basis that each of the parties submits that the decision of the tribunal is in error of law.

The tribunal's decision

12. 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 Departmental computer screen prints indicating that notification of the place and time of medical examination had been issued to the applicant, a specimen copy of the letter issued, and a computer screen print indicating that she had not attended. It included a specimen copy of a BF223 form enquiring as to the applicant's reasons for non-attendance, and a screen print indicating that it had been issued. The applicant had waived her right to an oral hearing and the matter proceeded on the papers.

13. The tribunal observed that no response was received to the BF223. In a reconsideration request the applicant had indicated that she forgot about the assessment as it was notified so far in advance. The tribunal noted that she did not suggest that she had been unable to attend due, for example, to physical or mental disability. It decided that she had not shown good cause for failing to attend the medical examination and disallowed the appeal.

Relevant legislation

14. 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.

15. Legislation provides for a medical examination as part of the ESA assessment process and provides consequences for failure to attend as follows:

> 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.

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.

Assessment

16. 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.

17. 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.

18. 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.

19. The applicant submits that the tribunal has erred in law on the basis that she "is entitled to her benefits just like everyone else claiming". She indicates that she failed to attend the medical due to illness. She states that she has subsequently been found unfit for work again.

20. The grounds advanced by the applicant do not give rise to an arguable case of error of law. She elected not to attend the tribunal and has not given any indication until now that she did not attend the medical examination due to illness. The tribunal cannot be faulted for not accepting a case that she did not advance to it.

21. However, the Department has made submissions on a different issue that is of assistance to the applicant. Mr Kirk refers to case law from the Upper Tribunal in Great Britain. In the case of *PPE v Secretary of State for Work and Pensions* [2020] UKUT 59, he observes that Judge Poynter found that the wording of the standard letter issued to ESA claimants "did not include anything that unambiguously expressed the element of compulsion that was necessary to impose a legal requirement on the claimant to attend the medical examination…".

22. The letter to the applicant in the present case – or at least the specimen copy placed before the tribunal - included the words:

> *"We have arranged an appointment for you at:*
>
> *It is important that you attend. If you fail to attend your benefit may be affected."*

23. The issue is similar to that arising in the case of *RS v Department for Communities* [2021] NI Com 4, which concerned medical examination for the purposes of personal independence payment (PIP). In that case I had noted the Upper Tribunal case of *IR v SSWP* [2019] UKUT 374, which also involved PIP, where it was decided that the letter inviting the claimant to an examination must use the language of clear and unambiguous mandatory requirement. I also noted *PPE v* SSWP [2020] UKUT 59 in the context that it held that the tribunal file must contain a copy of the letter sent or a standard form and evidence that a letter in that form had been generated by the computer system and dispatched.

24. Mr Kirk observes that the standard letter employed by the Department's medical support services does not use the language of necessary to impose a legal requirement on the applicant to attend her examination. He indicates that the Department has accepted the findings of Judge Poynter in *PPE v SSWP*, with the consequence that it has undertaken action to change the wording of the notification of appointment letter to ensure that it sets out the legal obligation to attend. He accepts that while the Department did not raise this issue in its submission to the tribunal, the tribunal has nevertheless erred in law.

25. I consider that the submission of Mr Kirk is a sound one. The legislation set out above at regulation 23(2) makes it mandatory for the Department to decide that the claimant does not have limited capability for work where he or she fails to attend a medical examination without good cause. The letter inviting the claimant to the medical examination merely

indicates that it is important to attend. It infers a discretionary consequence that "your benefit may be affected". However, there is no discretion permitted to the Department in the circumstances. The letter therefore does not accurately spell out the serious legal consequences of non-attendance.

26. I have accepted in *RS v DfC* that the principle outlined above applies in PIP cases. I can see no reason to distinguish it where the examination is for the purpose of the work capability assessment. As a matter of logic, it seems to me, without addressing the matter in any detail, that it must equally apply in ESA cases, where the legislation is in similar terms, and therefore I accept the Department's concession on this basis.

27. I find that the tribunal has erred in law. I set aside the decision of the appeal tribunal.

28. I make the decision that the tribunal should have made. I find that the wording of the standard letter that was sent to the applicant did not include anything that unambiguously expressed the element of compulsion that was necessary to impose a legal requirement on her to attend the medical examination on 4 March 2019. Consequently, she is not to be treated as not having limited capability for work from and including 5 March 2019 on the basis of failing to attend a medical examination on 4 March 2019.

(signed): O Stockman

Commissioner

15 September 2021