

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT & 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 29 January 2024

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 LD/841/23/51/P.
2. For the reasons I give below, I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The appellant had been in receipt of employment and support allowance (ESA) from the Department for Communities (the Department) from 28 June 2014 by reason of epilepsy. On 2 March 2020 a health care professional (HCP) examined the appellant on behalf of the Department. On 21 June 2021 the Department considered all the evidence and determined that the appellant had limited capability for work and limited capability for work related activity. On 27 May 2022 the appellant completed and returned an ESA50 questionnaire to the Department regarding her ability to perform various activities. On 25 May 2022 the appellant participated in a telephone consultation with a HCP on behalf of the Department. On 20 February 2023 the Department made a decision superseding and disallowing the appellant's award of ESA from and including that same date. She appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 29 January 2024. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 11 March 2024. The appellant 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 18 April 2024. On 26 April 2024 the appellant applied for leave to appeal from a Social Security Commissioner.

Grounds

5. The appellant submits that the tribunal has erred in law on the basis that:
 - (i) It did not accept that the appellant had learning difficulties.
 - (ii) It did not address the issue of risk from epilepsy correctly.
6. The Department was invited to make observations on the appellant's grounds. Mr Rush of Decision Making Services (DMS) responded on behalf of the Department. He accepted that the tribunal had erred in law as alleged and indicated that the Department supported the application. He then advanced a further ground in support of the appellant's case, arising from findings made by the Department in relation to the appellant's personal independence payment (PIP) on a different claim. He submitted that the appeal should be remitted to a new tribunal.
7. Mr O'Farrell duly responded to these observations and, very fairly and properly, pointed to a difficulty for his client in relation to Mr Rush's submission. He also took issue with the proposed form of disposal of the case advanced by Mr Rush, asking the Commissioner to decide the appeal.
8. Mr Rush in turn responded, as then did Mr O'Farrell. He enclosed a UC85 medical report prepared by a HCP in the context of a universal credit (UC) claim by the appellant.

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 relied upon for supersession and an earlier ESA85 HCP report. It further had two ESA85A report forms from the Department. The tribunal had a written submission from the appellant's representative enclosing the appellant's medical records and identifying the disputed activities as 3, 7 and 10 along with the "substantial risk" provisions of regulation 29(2)(b) and 35(2)(b). The appellant attended and gave oral evidence, accompanied by her mother and represented by Mr O'Farrell. The Department was represented by Ms Gillen.

10. The tribunal considered the appellant's complaints of a right shoulder problem, hearing problems and epilepsy. It heard that her shoulder problem had resolved after surgery. It observed that she used a hearing aid. It awarded points for 7.c and 10.b, totalling 12 points for physical activities. In relation to a submission that the appellant had learning difficulties, the tribunal considered that there was no evidence of this in the medical records. It had evidence that she could use a TV remote control, washing machine and that she read books. It did not award any points under the mental cognitive and intellectual function assessment.
11. It accepted that the appellant had epileptic seizures, and that there would be unsuitable workplaces due to their unpredictability, but observed that many people with epilepsy are in a work environment. It rejected the submission that there would be substantial risk to the appellant or others if found not to have limited capability for work or for work related activity. It therefore disallowed 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. Regulation 34 and Schedule 3 similarly provides for a test of limited capability for work related activity.
13. Further, regulation 29 and regulation 35 make provision for treating a claimant as having limited capability for work and for work related activity in particular circumstances. As far as is relevant in the present case, these provide:

29.—(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

(2) ...

(b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of

any person if the claimant were found not to have limited capability for work.

(3) Paragraph (2)(b) does not apply where the risk could be reduced by a significant amount by—

(a) reasonable adjustments being made in the claimant's workplace, or

(b) the claimant taking medication to manage the claimant's condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant.

...

35(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if—

(a) the claimant suffers from some specific disease or bodily or mental disablement; and

(b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.

Submissions and Assessment

14. 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.
15. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
16. 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.
17. For the appellant, Mr O'Farrell sets out the grounds of application over four A4 pages. He does not identify the specific grounds advanced in terms of the generally accepted categories of error of law. This makes the grounds advanced a little difficult to follow. However, my understanding of them is that Mr O'Farrell has submitted that the tribunal has erred in law for the following reasons.

18. Firstly, he refers to the appellant's mother's evidence – which is not in the papers before me - about the circumstances of her birth and subsequent head trauma that occurred in childhood. He accepts that whereas there is limited evidence of the appellant having any learning disability, he submits that this is indicated by the two ES85A reports which appear in the papers. These, he submits, would have drawn evidence from a past severe disablement allowance (SDA) claim, although the records of that claim are no longer in existence. As I understand him, he submits that there was evidence of learning disability before the tribunal, but the tribunal unfairly decided that there was no evidence of a learning disability, due to the absence of confirmation of any learning disability in the appellant's medical records. Thus, it appears to me, he has submitted either that the proceedings were procedurally unfair or that the tribunal has reached an irrational conclusion on the evidence.
19. Secondly, he submits that the tribunal placed weight on a letter in the papers that was signed by the appellant, which she denied writing. He observed that the tribunal concluded that the body of the letter and the signature were in the same handwriting, which Mr O'Farrell disputed. Whereas the tribunal made no express finding of fact in regard to this letter, he had an impression that the tribunal based a finding about the appellant's credibility on the dispute about the letter's origin. As far as I understand this ground, Mr O'Farrell appears to be submitting that, had the tribunal made a mistake of fact with regard to the letter, made an irrational finding and, had it formed a view of the appellant's credibility on the basis of the letter, conducted a procedurally unfair hearing.
20. Thirdly, in respect of the issue of "substantial risk" for the purposes of regulation 29 and regulation 35, Mr O'Farrell refers to the tribunal's findings. He submits that there is a link between stress and epileptic seizures. He submits that there are difficulties for the appellant in travelling to work. He submits that, whereas the tribunal found that many people with epilepsy undertake employment, there may be preventative measures in place in such cases to reduce risk. He submits that the tribunal has not applied the correct legal test under regulation 29(2) and 35(2).
21. For the Department, Mr Rush offered support for the appellant's case. He grouped the appellant's submissions into two categories, namely a submission that the appellant has a learning disability and should not be disadvantaged by a lack of corroborative evidence or by the tribunal's misunderstanding of some of the things said at hearing, and a submission that the correct legal test was not applied in relation to regulations 29 and 35 of the ESA Regulations. He supported the two grounds advanced.
22. Mr Rush went further, advancing a ground in the appellant's interests. He submitted that the unrelated findings of the Department in relation to PIP activity 1(f) could or should have been read across into ESA activity 15, or at least an explanation given as to why that approach was rejected, and submitting that failure to do this may have been an error of law.

23. In light of the degree of support offered by the Department to the application, I consider that it is evident that an arguable case arises and I grant leave to appeal.
24. The essence of the agreement between the parties is that there was evidence in Departmental documents back to 2014 that the appellant was judged as having learning disabilities. Earlier material which might indicate the basis on which she had been awarded severe disablement allowance from age 16 had been destroyed. The tribunal on the other hand had the past 18 years worth of medical records (the appellant was then 44) that did not appear to mention learning difficulties. Where the parties agreed was that the tribunal should have relied on the admittedly slim evidence before it, and accept that the appellant had learning disabilities, rather than discount this on the basis of a lack of corroboration in incomplete medical records.
25. A further basis of agreement was that the tribunal had not addressed the question of what work related activity the appellant could be expected to do for the purpose of regulation 35. I accept that this amounts to an error of law for the reasons I have elaborated in *SG -v- Department for Communities* [2024] NI Com 47 at paragraphs 24-29, with allowances for the fact that a different benefit was under discussion in that case.
26. It is enough for me to determine the appeal on those grounds, rather than go further and address the additional ground mooted by Mr Rush. I accept the submissions of the parties that the tribunal has erred in law and I allow the appeal.

Disposal

27. Mr O'Farrell asks me not to remit this appeal to a newly constituted tribunal, pointing out the particular difficulties of the appellant and submitting that the anxiety and stress resulting from the proceedings has led to an increased number of epileptic seizures. He further updates me on the subsequent history of the appellant's benefit entitlement to illustrate the narrow issues and dates that are in issue. In particular, the appellant was awarded UC from 2 February 2024 and the consequence is that the present appeal relates to a closed period from 20 February 2023 to 1 February 2024.
28. Regrettably, I do not consider that it is open to me to make a decision on the evidence before me. The tribunal that determines ESA appeals involves a legal member but also a medical member. It will be necessary for a tribunal constituted in that way to determine this appeal. I therefore refer the appeal to a newly constituted tribunal for determination.

(Signed): O STOCKMAN

COMMISSIONER

10 December 2024