BMcC-v-Department for Communities (ESA) [2019] NICom 78

Decision No: C1/19-20(ESA)

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 15 June 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. **This appeal by the claimant succeeds**.

2. Having earlier granted leave to appeal I now set aside the decision of the First-tier Tribunal made on 15 June 2017 under reference BE/9834/16/51/P.

3. I refer the matter to a completely differently constituted Appeal Tribunal for a fresh hearing and decision in accordance with the directions given below.

REASONS

Background

4. The appeal below concerned entitlement to an employment and support allowance (ESA). The appeal was heard at an oral hearing, and the appeal tribunal confirmed the decision of the Department of Communities that no award of ESA was merited. Leave to appeal was refused by the first tribunal and renewed directly to the Commissioner with the assistance of the representative, Mr. Graham Higgin, a Welfare Reform Adviser of Advice Space, Belfast.

5. The response of the Department for Communities, as Mr Higgin points out, has appeared somewhat contradictory, although my approach to the original application for leave may have been in part responsible for that. The application was said to be supported, but in fact was supported only up to a point. It was accepted that an error of law had been made, but

the argument was that it would not have made any difference to the outcome, therefore it was insufficiently material to result in the appeal succeeding. At that stage I offered the Department an opportunity to comment upon new issues that I was raising as potentially arguable, and at that juncture its representative filed a further submission opposing the application. In effect this was a submission opposing any appeal, and I have treated it as such.

6. I granted permission to appeal, saying:

> "2. I agree with the representative of the Department for Communities that the ground put forward in relation to activity 15 descriptor (c), that the tribunal failed to take into account the appellant's visual acuity, is simply unarguable given that the activity is contained within that part of the Schedule in which mental, cognitive and intellectual function is being assessed. I also agree that there is an arguable deficiency in the tribunal's treatment of that activity and descriptor in view of there being evidence of a mental health condition, and a lack of explanation as to how this might have impacted on that activity, or why it did not. However, as the Department points out in its observations, were activity 15 descriptor (c) to be applicable, that would score the appellant only six points, and that is insufficient to satisfy the test of entitlement. Accordingly, were that the only live issue, I would not grant leave.
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> 3. I have, however, considered other aspects of the tribunal's reasoning as set out in the written statement drafted by the tribunal chairman. I find that there are other arguable errors of law, which I set out below.
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> 4. In general terms it is arguable that the statement of reasons is insufficient to explain to the applicant what the Tribunal below found regarding his abilities within the various descriptors that had been put in issue. As an example, to set out the appellant's contentions, and then say, as this tribunal has done in the eighth paragraph, *"the tribunal, given the medical evidence, was not satisfied that the appellant's evidence to the tribunal was entirely credible. The tribunal accepted the assessment of the healthcare professional that that the appellant did not experience difficulties within the remit of the descriptors in the activities of coping with social situations and awarded no points of this activity"* is arguably insufficient to explain to the appellant what it was about the medical evidence that led the tribunal to take that view.

> 5. As to regulation 29, this had been specifically engaged, and was correctly contended for, given the variety of medical problems including mental health issues. The explanation as to that regulation not being applicable in this case is arguably insufficient to explain how this statutory test has been applied, and the reasoning is once again difficult to ascertain.
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> 6. Finally, the decision under appeal was a supersession decision, the claimant having been in receipt of ESA previously. Whilst the Department is able to supersede on the basis of a fresh medical assessment, there is nonetheless a need to indicate, where it is explicitly or implicitly argued that nothing has changed, what underlies the supersession."

The positions of the parties

7. The arguable issues that I added in my grant of leave were essentially a reasons challenge, together with an additional point as to whether grounds for supersession had been identified. In response Mr Collins, for the Department, makes the observation in respect of adequacy of reasons that the statement of reasons records that the tribunal considered the full GP notes and records in addition to the submissions. He comments that the appellant was represented, and the tribunal had the benefit of his oral evidence. The various disputed descriptors were identified in the written reasons, and each descriptor has been considered in the context of the written and oral evidence. The tribunal accepted the Health Care Professional's (HCP) assessment that no points were merited, and that the conclusion was reached after consideration of all the available evidence. Finally, he prays in aid the tribunal's poor view of the appellant's oral evidence. He says that the tribunal was entitled to come to those conclusions, in particular its conclusions as to credibility.

8. Mr Higgins for his part takes as his main theme the insufficiency of the statement of reasons, arguing that, specifically in relation to activities 8 and 15, and generally elsewhere, there is a lack of clarity as to the reasoning, and that the matter should be remitted to a fresh tribunal.

Discussion

Adequacy of reasons generally

9. In my judgment the submissions of the Department miss the essential point that the arguable error of law here was not whether or not the tribunal was entitled to come to the conclusions it did on the material before it but whether or not it has sufficiently explained those conclusions.

10. Mr Collins' arguments, even in light of his correct observation that the reasons of the tribunal have to be read as a whole, fail to tackle the essential problem that the tribunal has fallen into a common error, that of setting out the evidence and stating the conclusions, but not actually explaining what it was about the evidence it accepted that persuaded it, or why it rejected other evidence.

11. As an example, in relation to the activity of picking up and moving things the tribunal sets out comments made by the appellant's GP in the factual report (ESA 113). These indicated that he would have difficulty with upper limb activities due to tendinitis in his left thumb, that he had been advised to avoid heavy lifting due to an umbilical hernia and that "he would have difficulty with reaching, picking up and manual dexterity, but none of the other descriptors had been ticked." The direct quote is from the statement of reasons. It then goes on to rehearse the HCP's view that the appellant did not experience difficulties within the terms of the relevant activity, and says that the tribunal accepted that assessment. It did not discuss what it made of the evidence from the GP as to some difficulties in picking things up and manual dexterity; having rehearsed the GPs evidence, it simply ignored it.

12. In relation to the activity of mobilising, the statement of reasons proceeds as follows. The assertions of difficulty made by the appellant in the form ESA 50 are set out, as are the remarks that the healthcare professional recorded him as having made at the assessment. The HCP's observations and the result of her clinical examination are also recorded. There is then a summary of the appellant's representative's written submission to the tribunal, and the appellant's oral evidence. It is then stated,

> "The tribunal accepted as findings of fact the findings on examination of the healthcare professional's report in the report dated 3 June 2016. Insofar as there was a conflict in evidence the tribunal preferred the report from the healthcare professional which was comprehensive and objective and obtained through a process of clinical examination. The tribunal, given the medical evidence and what the appellant had told the healthcare professional, was not satisfied that the appellant's evidence to the tribunal was entirely credible."

13. It is not stated what it is about "the medical evidence" that leads the tribunal to that view; further, what is meant by "the medical evidence" is not explained. That is important, because "the medical evidence" in this case was significant, and the remark cannot reasonably be taken as simply referring to the evidence of the HCP. My copy of the tribunal bundle has poor quality page numbering, but, without counting, I can see that the medical evidence from the appellant's treating clinicians runs to in excess of 100 pages. The appellant must have been left asking the

question “What was it about the medical evidence that supported that conclusion?” I certainly was.

14. The tribunal then makes a further point, saying that it accepts the HCP’s assessment that no difficulties within the mobilising activities were shown because the appellant had told her that he could walk 10 to 15 minutes to the bus stop if he was going into town with his wife. (I leave aside that the appellant’s account as recorded in the report at page 5 of 28 was that he “would get the bus into town rarely with his wife.”)

The credibility finding

15. The general approach taken in the statement of reasons, that of setting out the evidence and the conclusion, and making the point (in the same terms) that “the medical evidence” and the appellant’s account to the HCP rendered his oral evidence to the tribunal not credible is followed in relation to other descriptors, and the findings of the HCP and her opinion are explicitly adopted by the tribunal.

16. In relation to his musculoskeletal problems the HCP’s conclusions were made on the basis of there having been “no specialist input” (as recorded at page 3 of 28).

17. The tribunal had before it the computer printout of a consultation the appellant had with his GP on 5 July 2016 about his joint problems. It refers to the appellant’s long-standing pain being more severe, his small joints being affected, his present pain relief being inadequate and the GP having discussed referral for assessment to a rheumatologist for consideration of a new diagnosis of psoriatic arthropathy, a condition which, it was said, may be alleviated by the drug methotrexate. The clear implication of the referral is that the GP had taken the appellant’s complaints seriously.

18. That evidence raised the possibility that matters had deteriorated between the HCP’s examination (3 June 2016) and the date of the decision under appeal on 22 July 2016. The tribunal should have investigated whether or not that was so, because it may have explained the difference between the appellant’s comments about his walking ability to the HCP, and the evidence of greater difficulty which he gave to the tribunal. Without that investigation it is difficult to conclude that the credibility finding was sufficiently informed to be fair.

19. That credibility finding in relation to the first activity under consideration in schedule 2 was repeated in relation to other activities. The tribunal’s conclusions may have been different in respect of a number of activities had an investigation been conducted as to the extent of any deterioration.

Regulation 29

20. The appellant's representative had specifically raised this as an issue in the appeal. He was right to do so given the appellant's medical history, which included work-related mental health problems.

21. In its consideration of regulation 29 in the statement of reasons, the tribunal sets out Mr Higgin's argument that physically the appellant could not continue with the manual work he had previously done, and that desk work would be difficult due to his lack of concentration, said to relate to his mental health problems. The tribunal also set out information from the healthcare professional's report that the appellant had been treated for depression on and off for many years due to work related stress, and which had worsened recently. It set out the HCP's view that the mental state examination she conducted had been normal, and it accepted her assessment (at page 20 of 28) that there was no risk to his health if he was found capable of work or work-related activities.

22. Given the above it is difficult to understand how the tribunal could, on the final page of its statement of reasons, state that,

> "There was no evidence to suggest that any of the exceptional circumstances as set out in regulation 29 of the Employment and Support Regulations applied to the appellant."

23. The summary that precedes the remark itself sets out that evidence, and the statement of reasons needed to explain what the tribunal made of it. In particular it needed to do that with reference to two substantial periods of work related stress during 2011/2012, and 2013/2014 when the appellant was off work. These are set out in the GP's notes together with details of further treatment for depression about two months prior to the decision under appeal. In the light of that evidence the tribunal could not simply adopt the conclusion of the HCP as to the applicability of regulation 29; it needed to discuss that view in the light of GP evidence, and come to its own view as to what level of risk, if any, within regulation 29 it thought likely, and if none, why that was so, given the GP notes.

My decision

24. I remit the case upon the basis that the statement of reasons is insufficient to explain the reasoning behind the tribunal's choice of descriptors and, materially in this case, in relation to its considerations under regulation 29.

25. As to Mr Higgin's arguments in relation to activities 8 and 15, I reiterate the remarks I made in granting leave, that the ability to get around which is tested by activity 15, must be the assessment of such ability in the light of any mental, cognitive and intellectual impairment, and not due to sensory difficulties, for example poor eyesight. That is assessed, insofar

as the ability to navigate safely is concerned, under activity 8. The limitations being assessed within that activity must be due to sensory impairment, and eyesight limitations fall within that. It will be a matter for the tribunal, using its experience and expertise, as to whether this appellant's sensory problems, which derive, as I understand it, from partial blindness in one eye, are likely to restrict him in relation to any of the descriptors in that activity. A number of references have been made to the appellant's ability to drive, and the tribunal will attach what weight it believes appropriate to that.

26. I do not need to rule on the other issues raised, either in the grounds of appeal or by me. They will be, in technical language, subsumed by the appeal, which is to say that the fresh tribunal will start again and make findings on all relevant matters. That tribunal, however, may wish to take into account the matters that were of concern to me when I granted leave to appeal, if only to guard against falling into similar arguable errors.

27. The appellant must understand that the fact that the appeal has succeeded at this stage on a matter of law is not to be taken as any indication as to what the tribunal might decide on the facts in due course.

CASE MANAGEMENT DIRECTIONS

1. These directions may be supplemented or changed by a Tribunal Chairman giving listing and case management directions. In view of the age of this matter the case should be referred for listing directions as soon as possible.

2. The appellant must understand that the fresh tribunal will be assessing his level of difficulty not at the time of the hearing, but as of the date of the decision under appeal, 23 July 2016. Evidence about things that have happened since then, for example fresh medical diagnoses, will be relevant if they shed light on what the position was likely to have been in July 2016.

3. The case will be an oral hearing listed before a differently constituted panel.

4. The new panel will make its own findings and decision on all relevant matters.

(signed): P Gray

Deputy Commissioner (NI)

3 December 2019