

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 12 November 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 with the file reference BE/8853/18/51/P.
2. 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. I set aside the decision of the appeal tribunal and 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 21 December 2017 by reason of shortness of breath and joint/muscle pain. On 18 July 2018 he was called to attend for medical examination by a health care professional (HCP) on behalf of the Department. He did not attend. He was sent a BF223 form to ask why he did not attend and he responded on 19 July 2018 saying that he did not feel that he should be asked to attend as he had an ongoing appeal to the Social Security Commissioner from an earlier such occasion. The Department considered all the evidence and determined that the appellant had not shown good cause for failing to attend

his examination, and made a decision treating him as not having limited capability for work and disallowing the appellant's award of ESA. The appellant requested a reconsideration and the decision was reconsidered by the Department but not revised. He appealed, but waived the right to an oral hearing of his appeal.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting alone. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 5 August 2019. 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 17 September 2019. On 2 December 2019 the appellant submitted his application for leave to appeal to a Social Security Commissioner.
5. The application was made outside the relevant time limit. However, the Chief Social Security Commissioner admitted the late application for special reasons on 9 June 2020.

Grounds

6. The appellant submits that the tribunal has erred in law on the basis that the tribunal disregarded his ongoing appeal to the Social Security Commissioner.
7. 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.

The tribunal's decision

8. 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 Department's pro forma invitation to an HCP examination; a screen print showing that this was issued to the appellant, according to the Department's submission, on 9 July 2018; a pro forma response returned on 20 July 2018 indicating the appellant's reasons for non-attendance; and the decisions and reconsideration requests in the case. The appellant had waived his right to an oral hearing and did not attend to give evidence.
9. The tribunal considered the documents before it. It found that the written notice of the medical examination had been issued to the appellant within the statutory timeframe and that he had not attended. It noted that the issue in the appeal was whether the appellant had "good cause" for not attending

the examination, within the meaning of regulation 23 of the ESA Regulations. It found that the onus of establishing good cause was on the appellant.

10. The tribunal noted that the appellant submitted that the current disallowance should not be upheld while his appeal to the Social Security Commissioner was being considered, indicating that his health was worse since then and that his financial situation was no better. It found that the fact that the appellant was awaiting a decision from the Social Security Commissioner upon an appeal did not amount to good cause and disallowed the appeal accordingly.

Relevant legislation

11. 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.
12. The question in the appeal derives from regulation 23 of the Employment and Support Allowance Regulations (NI) 2008. This provides:

“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”.

13. Regulation 24 spells out three matters that must be taken into account when assessing good cause, but the use of the word "include" indicates that other routes to demonstrating "good cause" are not precluded.

“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

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. I consider that the appellant establishes an arguable case on the ground that that the tribunal disregarded his ongoing appeal to the Social Security Commissioner and I grant leave to appeal on that basis.
18. The issue before the tribunal was technically the question of whether the appellant had good cause for not attending a medical examination on 18 July 2018. From his correspondence to the tribunal, it appears that he had sought a cancellation in advance of the examination on the basis that he was awaiting a Commissioner’s decision. He had indicated the same in his

letter of appeal to the tribunal, while referring also to his health and financial circumstances.

19. The appellant subsequently succeeded in the appeal to the Commissioner. As I said in the interim part of decision C10/18-19(ESA),

“19. The appellant further submits that an issue relating to finance was submitted by him but not considered by the tribunal. The tribunal has stated “It was not until the appellant’s letter dated 29.5.17 that he referred to the cost of travel to the Examination Centre so I do not accept that it was an issue on 13.8.16 [sic]. In fact, as accepted by Mr Kirk for the Department, ESA branch had accepted financial reasons as a factor in the appellant’s non-attendance at a previous examination. I also note that the appellant referred to this issue in his letter dated 21 February 2017.

20. The appellant points out that he has to travel from Larne to Belfast in order to attend the medical examination. There is cost involved. Whereas the cost of public transport, and taxi fares if approved in advance may be re-claimed from the Department after the event, the appellant’s point is that no travel voucher, such as would avoid having to meet the cost of travel upfront is provided. Mr Kirk invites me to consider whether the tribunal may have inadvertently erred in law by dismissing the contention regarding financial difficulties. It appears to me that it has”.

20. Whereas the present appeal was technically concerned with the position as it related to “good cause” on 18 July 2018, the appellant had made the point in his submissions in the Commissioner appeal that his financial circumstances precluded travel from Larne to the medical examination centre. The Department had accepted in the Commissioner proceedings that the failure of the tribunal to address this issue was an error of law. I allowed the appellant’s appeal in C10/18-19(ESA) and, having directed further evidence, I decided the appeal myself in the appellant’s favour under Article 15(8)(a) of the Social Security (NI) Order 1998.
21. It appears to me that the present iteration of this case has similarities with the position in the previous appeal. The appellant had submitted that his Commissioner proceedings were relevant to the appeal. However, the tribunal declined to wait for the outcome of that appeal.
22. I can understand that approach if the case had involved ongoing proceedings before another tribunal. Tribunals do not bind one another and it was entirely open to the tribunal to make its decision on the issues arising

without regard to another tribunal's proceedings. However, appeals to the Commissioner are addressed to possible errors of law by tribunals. They are also binding on tribunals to the extent that they offer an interpretation of the law. Thus, while the facts and circumstances of the appellant's case might have been different on the date addressed in the previous appeal and the 18 July 2018, it is also entirely possible that a principle of law might have been addressed in the Commissioner proceedings that had relevance to the current appeal.

23. In decision C10/18-19(ESA), I found that the appellant's difficult financial circumstances could amount to "good cause" to the extent that they prevented him attending the medical examination. I proceeded to find in the appellant's favour on the facts as they were in the earlier case.
24. I consider that a tribunal informed by the decision in C10/18-19(ESA) would have found it necessary to determine the appellant's financial circumstances at the relevant date and to address the issue of whether the Department offered an advance travel voucher to enable him to get from Larne to Belfast or from Larne to Ballymena, depending on the location of the medical examination. The location of the examination was not in fact specified in the evidence before the tribunal, and the tribunal would have needed to address the question of what sort of journey the appellant would have to undertake in terms of expense and the difficulty due to, and the impact on, his health.
25. The tribunal declined to await the outcome of the proceedings brought to the Commissioner by the appellant, which were addressed to the same regulations 23 and 24 of the ESA Regulations that it had to address. There is no overriding objective in the Social Security (Decisions and Appeals) Regulations (NI) 1999 that would have required the tribunal to have regard to avoiding delay as a factor in dealing with the appeal. It was under no formal obligation to proceed with the case. Nevertheless, it made the decision to proceed with the appeal before it without addressing the issues raised in the proceedings before the Commissioner. It consequently decided the appeal without regard to the financial circumstances of the appellant. In all the circumstances, I consider that the tribunal's decision to determine the appeal without waiting for the outcome of the relevant Commissioner proceedings was procedurally unfair.
26. Mr Kirk for the Department submits that the tribunal was addressing a different issue, as the appellant had made a new claim following the disallowance of ESA that was overturned by the previous proceedings. He submits that my decision in C10/18-19(ESA), therefore, "does not have a bearing upon the present case". However, it appears to me that the new claim was based on precisely the same medical conditions as the previous claim and would not have been made but for the disallowance that was overturned in the previous case. The issue of "good cause" on 18 July 2018

plainly had the potential to be different from the appellant's previous circumstances, but there is nothing that I can see in the papers or the submission of the Department that would lead me to understand that the appellant's circumstances were in fact different.

27. It appears to me that the tribunal in the present case has erred in law as indicated above, and that I must allow the appeal. I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.
28. The new tribunal shall have regard to the two distinct elements of C10/18-19(ESA) – that is both the interim and the final decision – and shall make relevant enquiries and findings of fact as to the matters raised by the appellant, namely his health and financial circumstances, when considering the question of whether he had good cause for not attending the medical examination on 18 July 2018. In particular, it shall investigate the location of the examination, the cost of attendance, the financial means of the appellant and the availability or otherwise of advance payment for the costs of travel by the Department.

(Signed): O Stockman

Commissioner

8 September 2020