

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**UNIVERSAL CREDIT**

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 23 August 2022

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is an application by a claimant for leave to appeal from the decision of a tribunal with reference ST/8072/21/05/O.
2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

**REASONS**

3. The issue in this case is whether the tribunal erred in law when deciding that the appellant did not have limited capability for work-related activity.

**Background**

4. The appellant had made a claim for universal credit (UC) to the Department for Communities (the Department) and had been awarded UC along with his partner from 20 February 2018. On 12 September 2018 the appellant returned a UC50 questionnaire to the Department answering questions about his capacity to perform certain activities. The appellant participated in a medical consultation with a healthcare professional (HCP) by telephone on 27 October 2020 and the Department received a copy of the HCP's report. On 7 November 2020 the Department decided on the basis of all the evidence that the appellant did have limited capability for work, but not limited capability for work-related activity, with the consequence that he was not entitled to the related element in his maximum UC amount.

5. The appellant requested a reconsideration. On 1 December 2020 the decision was reconsidered by the Department but not revised. The respondent appealed. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting with a medical member. The tribunal maintained the existing award and disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 24 February 2023. The appellant applied to the LQM of tribunal for leave to appeal to the Social Security Commissioner. The LQM refused the application by a determination issued on 23 June 2023. On 29 June 2023 the appellant applied to a Social Security Commissioner for leave to appeal.

### **Grounds**

6. The appellant, represented by Mr O'Farrell of Advice North West, submits that the tribunal has erred in law on the basis that:
  - (i) it made a mistake as to a material fact relating to the award of points for mobilising and standing and sitting;
  - (ii) it took account of post-decision circumstances contrary to Article 13(8)(b) of the Social Security (NI) Order 1998 and failed to give proper weight to contemporaneous medical evidence that contradicted the post-decision evidence;
  - (iii) it failed to take into account evidence of his award in relation to personal independence payment mobility component;
  - (iv) it made an irrational decision, or gave inadequate reasons, in the light of the evidence of the appellant's general practitioner (GP).
7. The Department was invited to make observations on the appellant's grounds. Mr Finnerty of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had not erred in law on the first three of the appellant's grounds. However, he accepted that it had erred in law as alleged in the fourth ground. He further submitted that the tribunal may have erred by proceeding in the absence of a contemporaneous UC50 questionnaire. On this sole basis, he indicated that the Department supported 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 had included a UC50 questionnaire completed by the appellant in 2018, a UC85 medical report form completed by the HCP in October 2020, decisions and correspondence. It also had extracts from the appellant's medical records. The appellant attended the hearing by way of a telephone connection and

gave oral evidence, represented by Ms Fulton. The Department was unrepresented.

9. The tribunal found that the appellant was suffering from vertigo, back pain, eczema, abdominal pain and cramps in his hands. He indicated that the vertigo was constant and while his Betahistine medication “takes the edge off it”, it doesn’t make it go away. He had been unable to go in the car to ENT for a consultant attendance. He described a limited 50 metre walking ability inside the house. He indicated he had given up driving some years previously. He did not leave the house. He had moved house recently, but only made one trip to the new house in that context.
10. The appellant submitted that he was not capable of work-related activity, based on the activity of mobilising in Schedule 7, paragraph 1. He also submitted that there would be a substantial risk to his physical or mental health if he was found capable of work-related activity. The tribunal did not accept his evidence as credible. In this context, it referred to a specific example of moving house and to attendances at the GP surgery. It noted that he had not followed up on specialist referral, considering that if he was as restricted as he claimed he would have sought further medical treatment. It found that he was not restricted to 50 metres mobilising and found that there would not be a risk to his physical or mental health if found capable of work-related activity.

### **Relevant legislation**

11. UC was established under the provisions of the Welfare Reform Order (NI) 2015 (the Order). The core rules provide for awards to include an amount in respect of the fact that a person has limited capability for work (article 17(2)(b) of the Order). They also amend work-related requirements where a claimant has limited capability for work (article 24(1) of the Order). By article 43 of the Order:

43—(1) For the purposes of this Part a claimant has limited capability for work if—

(a) the claimant’s capability for work is limited by his or her physical or mental condition, and

(b) the limitation is such that it is not reasonable to require the claimant to work.

(2) For the purposes of this Part a claimant has limited capability for work-related activity if—

(a) the claimant’s capability for work-related activity is limited by his or her physical or mental condition, and

(b) the limitation is such that it is not reasonable to require the claimant to undertake work-related activity.

(3) The question whether a claimant has limited capability for work or work-related activity for the purposes of this Part is to be determined in accordance with regulations.

12. The Universal Credit Regulations (NI) 2016 further provide at Part V and Schedules 6 to 9 for determining if a claimant has limited capability for work or for work-related activity. Regulation 41 provides for a specific test of limited capability for work and work-related activity. By regulation 41:

41.—(1) A claimant has limited capability for work and work-related activity if—

(a) it has been determined that—

(i) the claimant has limited capability for work and work-related activity on the basis of an assessment under this Part, or

(ii) the claimant has limited capability for work-related activity on the basis of an assessment under Part 5 of the ESA Regulations, or

(b) the claimant is to be treated as having limited capability for work and work-related activity (see paragraph (5)).

(2) A claimant has limited capability for work and work-related activity on the basis of an assessment under this Part if, by reason of the claimant's physical or mental condition—

(a) at least one of the descriptors set out in Schedule 7 applies to the claimant,

(b) the claimant's capability for work and work-related activity is limited, and

(c) the limitation is such that it is not reasonable to require that claimant to undertake such activity.

(3) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 7, it is a condition that the claimant's incapability to perform the activity arises—

(a) in respect of descriptors 1 to 8, 15(a), 15(b), 16(a) and 16(b)—

(i) from a specific bodily disease or disablement, or

(ii) as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement, or

(b) in respect of descriptors 9 to 14, 15(c), 15(d), 16(c) and 16(d)—

(i) from a specific mental illness or disablement, or

(ii) as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.

(4) A descriptor applies to a claimant if that descriptor applies to the claimant for the majority of the time or, as the case may be, on the majority of the occasions on which the claimant undertakes or attempts to undertake the activity described by that descriptor.

(5) Subject to paragraph (6), a claimant is to be treated as having limited capability for work and work-related activity if any of the circumstances set out in Schedule 9 applies.

(6) Where the circumstances set out in paragraph 4 of Schedule 9 apply, a claimant may only be treated as having limited capability for work and work-related activity if the claimant does not have limited capability for work and work-related activity as determined in accordance with an assessment under this Part.

13. Within Schedule 7 there are sixteen physical and mental descriptors that are determinative of the issue of whether the claimant has limited capability for work-related activity. Within this Schedule, the disputed activity for the purposes of the present case is activity 1, namely:

1. Mobilising unaided by another person with or without a walking stick, manual wheelchair or other aid if such aid is normally or could reasonably be worn or used.

1 Cannot either:

(a) mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion, or

(b) repeatedly mobilise 50 metres within a reasonable timescale because of significant discomfort or exhaustion

14. A further provision raised in the present case is Schedule 9, paragraph (4), whereby a person may be treated as having limited capability for work-related activity. This reads:

4. The claimant is suffering from a specific illness, disease or disablement by reason of which there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work and work-related activity.

## Submissions and hearing

15. I directed an oral hearing of the application. Mr O'Farrell of Advice North West appeared for the appellant. Mr Finnerty of DMS appeared for the Department. I am grateful to the representatives for their assistance.
16. In his application for leave to appeal, the appellant had initially relied on four grounds. However, in subsequent written submissions, Mr O'Farrell withdrew both his first ground and his third ground. He continued to rely on the submission that the tribunal took account of post-decision circumstances contrary to Article 13(8)(b) of the Social Security (NI) Order 1998. He further continued to submit that it failed to give proper weight to contemporaneous medical evidence that contradicted the post-decision evidence, and in particular, made an irrational decision, or gave inadequate reasons, in the light of the evidence. Mr O'Farrell placed particular weight on a letter from the appellant's GP dated 1 August 2019, addressing the effects of his vertigo. He submitted that this made it very clear that travel by car as a passenger was virtually impossible for the appellant, equating to a substantial risk of a deterioration of his health.
17. At hearing, Mr O'Farrell related his first ground regarding Article 13(8)(b) of the Social Security (NI) Order 1998 to the issue of the appellant's house move. The appellant's evidence had been that although he had moved house, he had only made one trip to the new house in the context of moving and that he had not helped with the move. The tribunal had said:

“We do not find the appellant to be an entirely credible witness and we believe he has exaggerated his restrictions. We were not convinced by his evidence regarding his involvement in moving house. We accept that this took place after the date of decision, but we felt that this evidence pointed towards an issue with credibility”.
18. Mr O'Farrell observed that the appellant moved house some 11 months after the date of the decision under appeal. He submitted that the tribunal had not enquired as to whether the appellant's condition had changed over that time.
19. Mr O'Farrell accepted that the evidence relating to the house move was only one part of the evidence relied upon to doubt the appellant's credibility. In particular, it had based findings on the expectation that, if the appellant's condition was as bad as claimed, he would have attended an ENT referral that had been offered.
20. However, Mr O'Farrell submitted that whereas the appellant attended his GP, the trip to the GP practice was 2 minutes by car as compared to a trip of 35-40 minutes to Altnagelvin Hospital. He pointed to the letter from the appellant's GP dated 1 August 2019 that was before the tribunal, indicating that the appellant would quickly start vomiting if travelling by car. Whereas

the tribunal had noted that the appellant had attended the GP practice for blood tests and the Covid vaccine, it had not compared an equivalent journey when rejecting his credibility and had not put the issue to the appellant for his explanation.

21. Mr O'Farrell submitted that the evidence of the GP indicated that there would be a substantial risk to the appellant's health contrary to Schedule 9 paragraph 4 were he to travel by car. He submitted that the tribunal should have addressed this issue more fully.
22. A further point advanced by Mr O'Farrell was that the tribunal did not apply a broad brush approach to the evidence. He submitted that the appellant's evidence was that his nausea was present every day, whereas the medical member had stated that vertigo was normally episodic and not bad all the time. He submitted that the tribunal had not resolved the conflict in evidence that arose.
23. Mr Finnerty submitted that the tribunal had based its decision on a finding that the appellant was not credible as a witness. He initially submitted that a tribunal has no obligation to explain its assessment of credibility, referring to C11/00-01(IB) at paragraph 7, where Mrs Commissioner Brown had said:

“Where a Tribunal makes it quite clear that it does not believe evidence it is not obliged in every case to explain why it does not believe the evidence. The Tribunal is required to give adequate reasons for its decision. It is not required to give reasons for its reasons”.
24. While noting Mr O'Farrell's submission around Article 13(8)(b), he submitted that the tribunal had considered other factors, such as medical treatment, and had found that these did not support the restrictions claimed by the appellant.
25. Mr Finnerty accepted that there was a conflict in the evidence of the appellant's GP to the effect that travelling by car was virtually impossible, and its finding that he had been able to travel to GP appointments. This latter finding appeared to be based on the medically qualified member's assessment at that vertigo was only ever episodic and not constant as described by the appellant. He accepted that the tribunal had not given an adequate explanation for preferring the medically qualified member's assessment over the assessment of the appellant's GP.
26. Mr Finnerty further observed that, while the appellant had completed a UC50 in August 2018, there was no up to date UC50 form before the tribunal. He had not returned a form when requested in June 2019, although he had participated in a HCP assessment in October 2020. Mr Finnerty submitted that by proceeding in absence of a recent UC50, the tribunal may have erred in law.

## Assessment

27. 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.
28. 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.
29. 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.
30. On the basis that Mr Finnerty supports one of the appellant's grounds and advances a different ground of his own in the appellant's interests I grant leave to appeal.
31. I consider that Mr O'Farrell's submissions addressed to the tribunal's findings on the circumstances of the appellant moving house some 11 months after the date of decision are correct. Article 13(8)(b) of the Social Security (NI) Order 1998 precludes a tribunal from taking account of circumstances not obtaining at the date of the decision under appeal. Had the tribunal directed questions and made express findings on the question of whether the appellant's condition had changed over the 11 months, it would not be open to criticism. However, it did not formally find that the circumstances at the date of decision and 11 months later were the same. This amounts to an error of law.
32. Whether it is a material error depends on the question of whether it was nevertheless entitled to reach the conclusions that it did on the remainder of the evidence.
33. If the issue of moving house is disregarded, the tribunal's findings on credibility rest entirely on the question of the appellant's failure to pursue specialist treatment. In this context, it had observed that, while he indicated that he could not travel by car to see a specialist, he had attended his own GP. Mr O'Farrell acknowledged that the appellant had attended his GP, but pointed out that this was a two minute trip by car, rather than a 35-40 minute trip from the appellant's home to Altnagelvin Hospital. The tribunal had sight of a letter from the appellant's GP dated 1 August 2019. In relation to the appellant, this stated:

"Unfortunately he suffers from severe vertigo associated with nausea and vomiting to the extent that he rarely goes out of his house ... Travelling by car is impossible and he quickly starts vomiting ..."



34. The tribunal referenced evidence of attending GP appointments and reasoned:

“We believe that the appellant has been able to travel to appointments when he believes it is appropriate to do so. If his vertigo was as restricting as claimed, we believe that the appellant would have attended the ENT referral offered.”

35. In the course of the hearing, the appellant was asked:

“We note that you didn’t attend ENT, why was that?”

I found it very difficult to go in the car. I wasn’t able to get it investigated. I just couldn’t go in the car. The day I did go, I was sick.”

36. And later, the tribunal record indicates:

“The Legally Qualified Member pointed out that there had been a referral to ENT which the Appellant hadn’t availed of.

The Legally Qualified Member asked if anyone had anything to say. The representative said that they are relying on the submission.”

37. It is not my role to second guess the tribunal which has had the benefit of seeing and hearing from the appellant directly. In the context of fact finding, I can only interfere with a tribunal’s decision if I consider that its findings of fact are irrational, in the sense that they are based on no evidence or the evidence compels a different conclusion.
38. The evidence here suggests that the appellant is limited by his condition from making car journeys. He therefore avoids these to an extent and remains largely at home. A car journey to Altnagelvin Hospital on his evidence, which is supported by his GP, would lead to nausea and vomiting. At the same time, I observe that there was documentary evidence before the tribunal that the appellant had attended the A&E Department at Altnagelvin on 21 October 2020, which is around the time of the appealed decision, in the context of an injury to his ribs.
39. The tribunal reasoned that if the appellant was as bad as he claimed, he would have been prepared to attend hospital for investigation and treatment. I understand that the appellant may have made the choice to stay at home and avoid the circumstance of car travel that would aggravate his symptoms. However, there is still force in the tribunal’s reasoning that in his general daily life his symptoms were not so bad as to lead him to suffer temporary discomfort for possible future relief. This is sufficient to

ground its decision, even if the issue of the house move is disregarded entirely.

40. The focus on how the appellant may be in the course of a car journey is also a bit of a distraction from the real question – namely his ability to mobilise unaided for the purpose of paragraph 1 of Schedule 7. The tribunal had accepted that he was restricted to mobilising 100 metres, going further than the HCP evidence accepted by the Department which accepted that he was restricted to mobilising 200 metres. It was not prepared to hold that he was restricted to 50 metres, such as would have brought him within paragraph 1 of Schedule 7. I cannot hold that its findings were irrational in the sense that they were not based on evidence or that the evidence compelled a different conclusion. I disallow the appeal on this ground.
41. Mr Finnerty had advanced a submission in the appellant's interests. This was that the tribunal may have erred by proceeding in the absence of a contemporaneous UC50 questionnaire. While he referred to this as a possible procedural error, there is no requirement on a tribunal to have a UC50 before it under any procedural rule. The real question, as I see it, is whether any procedural unfairness arose.
42. The evidence before the tribunal that was focused directly on the relevant descriptors consisted of a UC50 questionnaire dated August 2018 and a HCP medical report dated October 2020. As Mr Finnerty observes, the UC50 was of some vintage. However, this was due in part to his own failure to complete and return a UC50 issued to him in 2019.
43. The only aspect of procedural unfairness that I could anticipate in this situation is a failure on the part of the tribunal to hear the appellant's case. However, it conducted an oral hearing (albeit by telephone) and directed questions to the appellant that were relevant to the descriptors in dispute in the appeal. Whereas the UC50 might constitute the only direct evidence from an appellant in the situation where an appellant does not participate, here there was oral evidence. I consider that the tribunal was completely aware of the issues arising and the case being advanced by the appellant. I see no unfairness in these circumstances. Therefore, I reject Mr Finnerty's submission and I do not accept that the tribunal has erred on this ground.
44. This leads to a final issue raised by Mr O'Farrell, which also finds some support from Mr Finnerty. In short, Mr O'Farrell submitted that the tribunal did not adequately address the question of substantial risk to the physical or mental health of the applicant in the context of being found capable of work related activity. Evidence addressed to work related activity appeared at pages 91-95 of the Departmental submission to the tribunal in a document headed "Work Preparation Regime". These included work focussed interview requirements and work preparation requirements. The tribunal indicated its view that the appellant could participate in the particular activities without substantial risk to his health.

45. Mr Finnerty questioned the adequacy of the tribunal's reasons for its decision. He noted the evidence of nausea and vomiting when on car journeys, and the observation of the medical member that vertigo as a condition tended to be episodic and was unlikely to be present as a debilitating factor on a continuous basis as described by the appellant. He submitted that the tribunal had not resolved conflict between these two aspects of the evidence in the appeal. For my part, however, I see no inconsistency.
46. When I pressed Mr O'Farrell on the question of what risk to health would result from the relevant activities, he referred to the risk of nausea and vomiting were the appellant to have to travel. However, setting aside the question of whether nausea and vomiting would amount to a risk to health, I observe that the Work Preparation Regime includes the following at paragraph 42:
- "It is important for claimants who are assessed as LCW that facilities and reasonable adjustments are offered to accommodate health needs, including home and telephone interviews as appropriate and any work preparation requirements must be appropriate to their physical and mental capability and personal circumstances".
47. Whereas the reasons of the tribunal could have been more comprehensive, as suggested by Mr Finnerty, I am not satisfied that a material error of law arises. It appears to me that travel of the type that the appellant finds limiting is not necessarily a component of work related activity. The flexibility on offer would appear to me to remove any risk to the appellant. It follows that I do not accept that the tribunal has erred on this ground.
48. As I do not accept that the tribunal has erred in law, I must disallow the appeal.

(Signed): O STOCKMAN

COMMISSIONER

29 July 2024