SMcI -v- Department for Communities (ESA) [2014] NICom29

Decision No: C6/23-24 (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 17 August 2022

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. Both parties have expressed the view that the decision appealed against was erroneous in point of law.

2. Accordingly, pursuant to the powers conferred on me by Article 15(7) of the Social Security (Northern Ireland) Order 1998, I allow the appeal, I set aside the decision appealed against and I refer the case to a differently constituted tribunal for determination.

3. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his entitlement to Employment and Support Allowance (ESA) remains to be determined by another appeal tribunal.

4. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:

   (i) the decision under appeal is a decision of the Department, dated 3 September 2021, which superseded an earlier decision of the Department, and which decided that the appellant was not entitled to ESA from and including 3 September 2021;

   (ii) the Department is directed to provide details of any subsequent claims to ESA and the outcome of any such claims to the appeal tribunal to which the appeal is being referred. The appeal tribunal is directed to take any evidence of subsequent claims to ESA into account in line with the principles set out in *C20/04-05(DLA)*;

(iii) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and

(iv) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

**Background**

5. In his written observations on the original application for leave to appeal, Mr McKendry, of the Decision Making Services (DMS) section of the Department set out the following background to the application:

> "(The appellant) claimed employment and support allowance (ESA) from 14/11/18 by way of Meniere's disease and dizziness. At this stage following a referral to Medical Support Services the Department considered that (the appellant) had LCW and limited capability for work-related activity (LCWRA).
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> In and around late 2020 (the appellant) was issued with questionnaire form ESA50. Unfortunately this form has been misplaced by the Department.
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> On 13/11/20 a healthcare professional (HCP) conducted a telephone review of the (the appellant's) LCW and LCWRA in line with Government directives due to COVID (it would appear that the misplaced questionnaire form ESA50 was before the HCP at this examination). On 03/09/21 the decision maker (DM) considered all the evidence available and determined that (the appellant) scored 0 points and therefore did not have LCW. The DM then made a decision on 03/09/21 that (the appellant) did not have LCW and his award was terminated from that date.
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> On 27/09/21 The Appeals Service (TAS) received an appeal from (the appellant). This was forwarded to the Department on 27/09/21. On 14/10/21 a DM carried out a mandatory reconsideration. The decision of the Department dated 03/09/21 however remained unchanged.
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> On 22/10/21 the Department completed its appeal submission. This submission was shared with (the appellant) who subsequently on 08/11/21 requested that the appeal be determined by way of a paper hearing.

> The Tribunal convened on 17/08/22. This took the form of a paper hearing. The record of proceedings (ROPs) show that the tribunal considered the Appeal submission papers, an email from TR and a sick note from Dr W. The tribunal upheld the decision of the Department dated 03/09/21 (as reconsidered on 14/10/21).
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> On 22/09/22 (the appellant's) representative requested that the decision of the Tribunal bet "set-aside". The Legally Qualified Member (LQM) refused to set-aside the decision of the Tribunal but directed that the application be treated as "*an authorised request for a statement of reasons for the tribunal's decision*." The Statement of Reasons (SORs) along with the record of proceedings (ROPs) were issued to (the appellant) on 12/01/23. On 24/01/23 (the appellant) applied for leave to appeal to the Commissioner. On 08/02/23 the LQM refused leave to appeal to the Commissioner.
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> On 28/02/23 (the appellant) applied directly to the Commissioner for leave to appeal the decision of the tribunal dated 17/08/22. This was received in the Commissioner's Office on 02/03/23."

6. To that narrative I would add that on 6 March 2023 written observations were requested from DMS. In observations received on 27 March 2023, Mr McKendry, for DMS supported the applications. The basis for that support is set out below.

7. The written observations were shared with the appellant on 27 March 2023.

8. On 11 January 2024 I granted leave to appeal. When granting leave to appeal I gave, as a reason, that the grounds of appeal, as set out in the application for leave to appeal, are arguable. On the same date I determined that an oral hearing of the appeal would not be required.

**Errors of law**

9. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?

10. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

"(i) making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …

Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

**Disposal**

11. The most expeditious method of disposal of this appeal is by the application of Article 15(7) of the Social Security (Northern Ireland) Order 1998.

12. In his written observations on the application for leave to appeal, Mr McKendry stated the following:

'**The Departments response:**

14. The question for the Tribunal to decide was whether (the appellant) had limited capability for work in accordance with the limited capability for work assessment (section 8(2) of the Welfare Reform Act (NI) 2007 and regulation 15 of the Employment and Support Allowance Regulations (NI) 2016). This is a statutory test that has to be applied by the appeal tribunal. The limited capability for work assessment is 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 as prescribed in Schedule 2 to the Employment and Support Allowance Regulations (NI) 2016. To have limited capability for work (the appellant) would have to have scored 15 points, whether for physical descriptors, mental, cognitive and intellectual function descriptors or a

combination of both. The tribunal upheld the decision of the Department that awarded (the appellant) 0 points.

15. The substance of (the appellant's) appeal revolves around the fact that questionnaire form ESA50, (whilst before the HCP), was not available to both Departmental determinations and subsequent decisions on his LCW and indeed to the Tribunal. It is evident that this questionnaire was before the HCP and that they considered its contents in the completion of the report. The Department in its decision dated 03/09/21 made reference that the questionnaire had been before the HCP. Subsequent to this, the missing questionnaire is not referred to in its reconsideration request (nor listed as having been considered as evidence). The Tribunal have further made reference to the fact that:

> "*The appellant completed a new questionnaire as part of the review process and although this has subsequently been lost and was not available to the Tribunal it was available to the Healthcare Professional at the time the new assessment was conducted on 13/11/20."*

**Possible error of law**

16. When considering if a claimant has LCW (or indeed LCWRA) the Department is duty bound to consider all the evidence before it. The HCPs report is in most cases an essential part of the decision making process. I would, however submit that this report should not be "rubber stamped" as such and that decision makers and indeed Tribunal's must consider and state as to why they prefer certain evidence over others. When ESA was introduced there was a five year review set up "The Harrington Report", later to transform to the "Litchfield Report" due to health issues of the previous author. Initially, as alluded to above, it appears that most decision makers were placing more weight on the HCP's report. In year three of this report (for easement I shall attached a copy with my observations) it recommended:

> "*Keeping the* ***Decision Maker central to the assessment process*** *and* ***providing them with all the further documentary evidence they need to get the decision 'right first time'****: shifting the emphasis from the independent face-to-face assessment to a more holistic approach will help improve both*

> *the accuracy and the integrity of the whole process. Decision Makers are being empowered, but they need to have access to as much information as possible on which to make their decisions and to be given latitude to make these decisions 'right first time'"*

The above approach adopts the policy that the decision maker should have access to as much information as possible to ensure that the correct decision is made initially.

I would submit that in this case, it is clear that both, the Department and the Tribunal did not fully consider the full facts of the case. The questionnaire form ESA50 is a crucial piece of evidence provided by the claimant detailing in their own words how their disabilities/illnesses affect their ability to carry out daily duties.

There is no doubt that the claimant would have been aware (prior to any hearing) that the Department had considered that the ESA50 had been "lost". This is evidenced at paragraph 3 in Section 4 "The facts of the case" in the Department's submission. I would submit however that the claimant cannot be expected to have an expertise in Social Security legislation and indeed Departmental procedures.

17. Chief Commissioner Mullan in AH v Department for Social Development (DLA) [2011] NICom 202 considered the inquisitorial role of a Tribunal. At para(s) 31 et seq he held:

> "31. *The inquisitorial role has been interpreted in another way, however, as including the requirement for the appeal tribunal to provide support to the parties to the proceedings in order to ensure full participation in the appeal process to the fullest possible extent and to enable the parties to present all aspects of their case as fully and completely as possible. In this context, the inquisitorial role is sometimes called the enabling role.*
>
> *32. In my view, the enabling role takes on its greatest significance in the following situations:*

*(1) oral appeals where the appellant is unrepresented, and where the Department may be represented;*

*(ii) oral appeals where the appellant is unrepresented and does not make an appearance, and where the Department may be represented; and*

*(iii) paper cases where the appellant is unrepresented.*

*33. In these situations, and in a balanced and objective way, the appeal tribunal is under a duty to explore all of the relevant issues, and assess the evidence linked to those relevant issues, even where some or all of those issues have not been raised by the appellant. Further, the appeal tribunal is under a duty to note, in any statement of reasons (SORs) for the appeal tribunal's decisions, that it has addressed all relevant issues, assessed the evidence linked to those issues, found facts with respect to those issues and made an appropriate decision, related to entitlement to the benefit at issue.*

*34. Balance also means that the appeal tribunal does not require, as was noted by Mrs Commissioner Brown in C5/03-04(IB), at paragraph 21 "to exhaustively trawl the evidence to see if there is any remote possibility of an issue being raised by it." It is often the case, however, that unrepresented claimants to social security benefits do not understand the subtleties of the conditions of entitlement to that benefit. In any claim to a disability benefit, or appeal against an adverse Departmental decision with respect to that claim, the claim or appeal is often couched in general assertions with respect to the disability and may not be specifically related to the conditions of entitlement as understood by the decision-maker or appeal tribunal.*

*35. Accordingly, the appeal tribunal must be alert to the objective consideration of specific issues even though these may not have been raised by the appellant. The appeal tribunal*

*will have to go beyond the detail, however general, of the appeal letter, and consider all of the evidence before it, which will usually include evidence relating to the initial claim to the benefit and determine all issues which are relevant to the appeal.*

*In the present case there is nothing in the reasons for the tribunal's decision to indicate that it considered if (the claimant) had any needs when his condition was not controlled by the medication. It is therefore my submission that the tribunal has failed in its inquisitorial role and as such has erred in law*."

Further to this in CO1-16-17(DLA) Deputy Commissioner Stockman considered procedural fairness. At paragraph 20 he held:

"*The concept of legitimate expectation is a sub-set of procedural fairness. I accept the submission that, having consented to the release of her medical records in the context of having paid for their release, the appellant would legitimately have expected her GP to send these to the tribunal. Equally, she would have legitimately expected the tribunal to have seen the medical records before reaching its decision. She was not present at the tribunal and therefore did not know that the records were not produced. She was not in a position to request an adjournment of the hearing to ensure that the records could be seen and considered."*

Whilst the above case referred to the absence of the claimant's medical records I would submit that this premise would still hold to the absence of the questionnaire form ESA50 which forms a crucial part of the evidence in the decision making process.

Chief Commissioner Martin (as he was then) in decision C31/02-03(IB) considered the issues of a missing medical report and indeed a missing IB50 questionnaire. At para(s) 12 et seq he held:

12."*I am concerned in this case with the fact that not only did the Tribunal proceed without the missing medical report but also the*

*Tribunal did not have the benefit of the missing IB50 as well. The IB50 sets out, in substance, what the claimant's case was. This is normally an important document for the Tribunal to consider when determining a claimant's appeal. Of course the Tribunal still had the benefit of the claimant's oral evidence but for an unrepresented claimant it is very difficult for such a person to make all the relevant points without even having an IB50 before the Tribunal as an aide memoire. The lack of the medical report from the Examining Medical Practitioner is also a considerable loss to the Tribunal even though form PA1, which included extracts from the Examining Medical Practitioner's report, was available.*

*13. There is no doubt that the Tribunal had considerable concern for the situation it found itself in – namely that it was not in possession of the two relevant important documents. It also very properly explained that if it felt at any stage that it was not appropriate to make a decision in the case in light of the evidence available to it it would adjourn the case. It is also relevant that the claimant had no objection to this course.*

*14. The final outcome in this case was relatively close in that the points scored by the claimant, namely 12, were not far short of the relevant statutory threshold in this case of 15 points for physical disability descriptors. It is also relevant that the decision maker acting on behalf of the Department had only awarded the claimant 9 points which accorded with the Examining Medical Practitioner's score.*

*15. However, I would have expected that the Tribunal, in the process of disallowing this particular claim by deciding that the claimant was only worthy of a 12 point score, would have returned to the issue of the propriety of proceeding to hear evidence in the absence of the IB50 questionnaire and the Departmental medical report. It seems very likely to me that the Tribunal has inadvertently lulled the claimant into a false*

*sense of security by stating that it would adjourn the case if it felt that it was not appropriate to make a decision. The claimant could well have considered that the case would be adjourned if it was going badly for her but, on the other hand, if it was going well for her it would proceed to finality.*

*16. The Tribunal felt able to proceed to come to a decision with the extracts of the medical report included in the summary which in turn was taken from the decision maker's score sheet, and with the oral evidence of the claimant rather than the usual IB50. Also the Tribunal apparently did not have any General Practitioner comments at the rear of the IB50 although it did have a letter from the General Practitioner dated 26 April 2002.*

*17. The claimant was unrepresented and I consider that there was a duty on the Tribunal to ensure in such circumstances that any proceedings were scrupulously fair when it decided to continue despite the absence of the IB50 and the medical report.*

*18. If the score given to the claimant by the Tribunal under the Personal Capability Assessment had been well below the threshold figure of 15 points for physical disability descriptors there might have been no reason not to continue. However, the Tribunal having given a score of 12 points, there is no doubt that the claimant was reasonably close to success. In such circumstances I consider that the Tribunal should have considered the position of the claimant with considerable caution. At the very least I would have expected the Tribunal to explain to the unrepresented claimant that having heard the available evidence it was in a position to come to a decision but also explain that it could give the claimant an opportunity to adduce further evidence in light of the fact that the usual evidence from the Examining Medical Practitioner and the IB50 was not available to the Tribunal. The Tribunal Chairman might also have thought it appropriate to direct the claimant to complete a fresh IB50 questionnaire, under the*

*provisions of regulation 38(2) of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999 (even though with the passage of time such a questionnaire is not so relevant as, by virtue of the provisions of Article 13(8) of the Social Security (Northern Ireland) Order 1998, an Appeal Tribunal shall not take into account any circumstances not obtaining at the time when the decision appealed against was made). The Tribunal ought also to have considered specifically whether or not a further medical examination was necessary in the circumstances.*

*19. Mrs Gunning has put considerable weight on the fact that the claimant did not object to the course of action being taken by the Tribunal. However, as stated earlier in this decision, I do not consider that one can assume that an unrepresented claimant would be in a position to understand the implications of an agreement to go on with the case. At the very least I consider that, before the Tribunal came to its decision which was a decision against the claimant, it ought to have considered specifically whether or not to obtain a further medical report and/or an IB50. I can conceive of a situation where the Tribunal could have been correct to continue if the clear implications of what was happening had been explained to the claimant. However, the very full record of proceedings in this case does not show that the matter was dealt with by the Tribunal in any way.*

*20. Accordingly, for the reasons stated, I consider that the Tribunal's approach to this issue was in breach of the principles of natural justice and therefore the decision of the Tribunal was erroneous in point of law. I therefore allow the claimant's appeal and set aside the decision of the Tribunal and refer the case back to a freshly constituted Tribunal for rehearing. I direct that this new Tribunal specifically considers prior to the hearing whether it is appropriate to direct that the claimant has the opportunity to complete a fresh IB50 questionnaire and/or to arrange*

*for another medical examination of the claimant. I leave the matter whether such further evidence is necessary to the Tribunal as, from experience, I am aware that it is possible that the appropriate missing documents or secondary evidence of their contents will turn up before the new Tribunal re-hears the case.*

*21. It goes without saying, however, that I deprecate the fact that the adjudicating authorities in this case appear to have lost two of the most important documents necessary for this appeal. All efforts should be made to make sure that the claimant is not put at a disadvantage because of the documents being mislaid. Regrettably this is far from being an unknown occurrence and I hope that steps are being taken to ensure that a repetition of the present situation is unlikely to happen again in the future.*

*22. The success of this appeal to a Commissioner should not be taken as an indication that the claimant's appeal to the Tribunal is ultimately going to be successful."*

In consideration of the above and in the interests of natural justice I would submit that the Tribunal, in not considering the absence of the questionnaire form ESA50 has erred in law.

I would further submit that in the circumstances the Tribunal should have adjourned to either, have a "constructed ESA50 completed by the claimant detailing their condition at the relevant date or requested a further oral hearing whereby it could have extrapolated any evidence directly from the claimant in relation to their condition at the relevant date.

**Conclusion:**

18. In conclusion for the reasons stated above at paragraph(s)16 and 17 I submit that the decision of the appeal tribunal dated 17/08/22 is an error of law and I would support (the appellant's) application for leave to appeal to the Commissioner. In the event of the Commissioner granting leave to appeal, I consent to the Commissioner treating the application as an appeal and determining any question arising on the application as if it

rose on appeal. I also confirm that my observations may be treated as observations under Regulation 18(1) of the Social Security Commissioners (Procedure) Regulations (Northern Ireland) 1999'.

(signed): K MULLAN

CHIEF COMMISSIONER

4 September 2024