SG-v-Department for Communities (DLA) [2016] NICom 64

Decision No: C19/16-17(DLA)

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

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

**DISABILITY LIVING ALLOWANCE**

Appeal to a Social Security Commissioner

on a question of law from a Tribunal's decision

dated 18 December 2015

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 18 December 2015 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

2. I would ask the Legally Qualified Panel Member (LQPM) to note that the appeal has been allowed as I am satisfied that, following the decision of a Tribunal of Commissioners in *RGS v Department for Social Development (ESA)* ([2016] NICom 39), there has been a procedural irregularity which was capable of making a material difference to the outcome or the fairness of the proceedings. I have not addressed the manner in which the appeal tribunal addressed the substantive issues arising in the appeal.

3. For further reasons set out below, I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. An appeal tribunal which has a Medically Qualified Panel Member is best placed to assess medical evidence and address medical issues arising in an appeal. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.

4. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.

5. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his ongoing entitlement to disability living allowance (DLA) remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

 **Background**

6. On 28 August 2014 a decision-maker of the Department decided that the appellant was not entitled to DLA from and including 17 June 2014. An appeal against the decision dated 28 August 2014 was received in the Department on 16 March 2015. Although the appeal was received outside of the prescribed time limits for making an appeal it was accepted by an LQPM on 8 July 2015.

7. On 22 September 2015 the appeal tribunal clerk made a submission to the LQPM indicating that the appellant had not returned a ‘hearing type enquiry form’ and had not consented to the release of his General Practitioner (GP) records. The LQPM was asked to determine whether the appeal should proceed as a ‘paper’ hearing. On 1 October 2015 the LQPM asked the clerk to confirm whether the appellant had an appointee and determined that, if not, the correspondence regarding the type of hearing and the GP records consent form should be sent again to the appellant.

8. In a form which is dated 2 October 2015 the appeal tribunal clerk made a further submission to the LQPM indicating that the appellant had not returned the ‘hearing type enquiry form’ and had not consented to the release of his General Practitioner (GP) records despite the relevant correspondence having been forwarded to him again further to the LQPM’s determination of 1 October 2015. I am certain that the date of 2 October 2015 on this form must be erroneous. Once again, the LQPM was asked to determine whether the appeal should proceed as a ‘paper’ hearing. On 22 October 2015 the LQPM determined that the appeal should proceed by way of a ‘paper’ hearing.

9. The hearing took place on 18 December 2015 and proceeded as an appeal to be determined on the ‘papers’ alone. The appeal tribunal disallowed the appeal and confirmed the decision dated 28 August 2014.

10. On 24 March 2016 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). On 15 April 2016 the application for leave to appeal was refused by the LQPM.

 **Proceedings before the Social Security Commissioner**

11. On 26 May 2016 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 15 June 2016 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations received on 6 July 2016, Mr Culbert, for DMS, supported the application for leave to appeal on a ground identified by him. Written observations were shared with the appellant’s representative on 6 July 2016.

12. On 9 September 2016 I granted leave to appeal. When granting leave to appeal I gave, as a reason that a procedural error may have arisen in the manner in which the appeal was listed for hearing. On the same date I directed that an oral hearing of the appeal would not be required.

 **Errors of law**

13. 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?

14. 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.”

 **Analysis**

15. In his constructive and helpful written observations on the application for leave to appeal, Mr Culbert made the following submissions:

‘On 2nd October 2015 the Tribunal Clerk made a submission to the Legally Qualified Member (LQM) advising that there had been no response to the hearing type enquiry form (Reg2) and asked may the appeal now proceed as a paper hearing. On 22nd October 2015 the LQM directed that the case should be listed for paper hearing and on 18th December 2015 the appeal was disallowed at a paper hearing.

A recent Northern Ireland Tribunal of Commissioners in *RGS v Department for Social Development (ESA) [2016] NICom 39* (RGS v DSD) addressed a similar scenario. In that case it was found that The Appeals Service’s procedure did not comply with the legislative requirement concerning the issuing of form Reg 2(i)(d) namely:

Regulations 39 and 46 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 state:

***39. — Choice of hearing***

*(1) Where an appeal or a referral is made to an appeal tribunal the appellant and any other party to the proceedings shall notify the clerk to the appeal tribunal, on a form approved by the Department, whether he wishes to have an oral hearing of the appeal or whether he is content for the appeal or referral to proceed without an oral hearing.*

*(2) Except in the case of a referral, the form shall include a statement informing the appellant that, if he does not notify the clerk to the appeal tribunal as required by paragraph (1) within the period specified in paragraph (3), the appeal may be struck out in accordance with regulation 46(1).*

*(3) Notification in accordance with paragraph (1)–*

*(a) if given by the appellant or a party to the proceedings other than the Department, must be sent or given to the clerk to the appeal tribunal within 14 days of the date on which the form is issued to him;*

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***46. — Appeals which may be struck out***

*(1) Subject to paragraphs (2) and (3), an appeal may be struck out by the clerk to the appeal tribunal–*

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*(d) for failure of the appellant to notify the clerk to the appeal tribunal, in accordance with regulation 39, whether or not he wishes to have an oral hearing of his appeal.*

*(2) Where the clerk to the appeal tribunal determines to strike out the appeal, he shall notify the appellant that the appeal has been struck out and of the procedure for reinstatement of the appeal as specified in regulation 47.*

The Commissioners in *RGS v DSD* held that:

*“...the actual circumstances in which the form was not returned are not material. It is enough that it was not received by TAS...*(paragraph 27)

*...because he did not return the Reg2(i)d form, the appellant in the present case did not exercise choice. It is clear that the appellant had not unequivocally waived his right to an oral hearing in these circumstances. There was no follow up correspondence when the appellant failed to return the Reg2(i)d form, which might have alerted the appellant to the course of events which was unfolding. Whereas his case was listed as a “paper” hearing, he was not notified of that fact and was not aware of the progress of his appeal until a decision notice was received.*

*The Decisions and Appeal Regulations provide in such cases for striking out an appeal, notifying the appellant of that fact and, thereby, giving him a chance to apply for re-instatement under regulation 39(5). Nevertheless, the Decisions and Appeals Regulations are silent on what should happen if the power to strike out an appeal is not exercised. The practice adopted by TAS in the present case was to proceed to a paper hearing in the appellant’s absence without notifying him of time and place of hearing. However, there is no procedural basis for holding such a hearing in these circumstances under the Decisions and Appeals Regulations. In the absence of procedural rules governing the circumstances, it would have been equally valid to have listed the appeal as an oral hearing with notification to the appellant.*

*Whereas the Decisions and Appeals Regulations are silent on which of these options should have been followed, we consider that the jurisprudence of the ECtHR points to a conclusion. On the basis of Miller v Sweden, we conclude that the appellant had a right to an oral hearing in the context of the system of ESA appeals. On the basis of Schuler-Zgraggen v. Switzerland we consider that the appellant could have waived his right to an oral hearing by an unequivocal statement to that effect. In all the circumstances of the case, the fact that the appellant did not return the Reg2(i)d to TAS meant that he had not unequivocally waived his right to a hearing. We conclude that the determination of his appeal without an oral hearing, in the absence of an unequivocal waiver of his right to an oral hearing, violated the appellant’s right to a fair hearing under Article 6(1) of the ECHR.* (paragraphs 43 to 45)”

The Commissioners therefore held that when a tribunal decides to hold a paper hearing due to non return of the Reg 2(i)d, without notifying the appellant, the result is a violation of his right to a fair hearing under Article 6(1) of the European Convention on Human Rights (ECHR).

The Commissioners also held that there is a breach of the rules of natural justice/procedural unfairness in such circumstances, relying upon a decision of a GB Commissioner in CIB/5227/1999 which was recently endorsed by the Chief Commissioner in *SD-v-Department for Social Development* (ESA) [2015] NI Com 32.

They considered that *“...regardless of the position under Article 6(1) of the ECHR...the appellant had a right to an oral hearing as a matter of natural justice in the absence of [the Tribunal] receiving the Reg 2(i)d”* (paragraph 48).

I therefore submit that (the appellant’s) circumstances are exactly the same as the appellant in *RGS v DSD.* Despite him not returning the Reg 2(i)d (regardless of the particular reason)he did not unequivocally waive his right to an oral hearing. The tribunal’s decision to hold a paper hearing in such circumstances was a violation of his Article 6(1) right to a fair hearing. It was also a breach in the rules of natural justice/procedural unfairness.

The Commissioners in *RGS v DSD* further highlighted that the benefit under appeal was Employment and Support Allowance and such appeals have characteristics which mean that they are more accurately determined on the basis of oral evidence together with documentary evidence than on the basis of documentary evidence alone. I would submit that (the appellant’s) appeal against a Disability Living Allowance decision (which similarly requires assessment by a medical tribunal) would equally fall to the same considerations.

I would therefore support (the appellant’s) application for leave to appeal to the Commissioner - that in light of the recent decision in *RGS v Department for Social Development (ESA) [2016] NICom 39*, the tribunal in the present case has similarly erred in law on the basis of procedural unfairness and a breach of the appellant’s rights under Article 6(1) ECHR.

I would respectfully suggest that the same outcome decided in *RGS v DSD* should be reached in the present appeal – namely that the tribunal’s decision is set aside and direction given for (the appellant’s) appeal to be determined by a newly constituted tribunal.’

16. I agree with this comprehensive analysis and, for the reasons which have been set out by Mr Culbert, agree that the decision of the appeal tribunal has to be set aside.

17. Having found that there has been a procedural irregularity which was capable of making a material difference to the outcome or the fairness of the proceedings, I do not have to consider the appellant’s other grounds for appealing.

 **Disposal**

18. 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 28 August 2014 in which a decision maker of the Department decided that the appellant was not entitled to DLA from and including 17 June 2014;

 (ii) the Department is directed to provide details of any subsequent claims to DLA 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 DLA 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.

(signed): K Mullan

Chief Commissioner

5 October 2016