LC-v-Department for Communities (ESA) [2025] NICom 9

Decision No: C6/24-25(ESA)

**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 22 February 2024

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 reference BE/3925/20/51/P.

2. An oral hearing of the application has been requested. However, I consider that the proceedings can properly be determined without an oral hearing.

3. 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 refer the appeal to a newly constituted tribunal for determination.

**REASONS**

 **Background**

4. The appellant had been in receipt of employment and support allowance (ESA) from the Department for Communities (the Department) from 6 June 2014 by reason of neck pain, work-related stress and acid reflux. On 24 November 2016 the appellant completed and returned an ESA50 questionnaire to the Department regarding her ability to perform various activities. On 24 April 2017 a health care professional (HCP) examined the appellant on behalf of the Department. On 16 May 2017 the Department considered all the evidence and determined that the appellant did not have limited capability for work from and including 16 May 2017, and made a decision superseding and disallowing the appellant’s award of ESA. The appellant requested a reconsideration of the decision, which was reconsidered but not revised. She appealed. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 23 August 2017. The tribunal disallowed the appeal, but the tribunal’s decision was set aside in the Commissioner’s decision with reference *LC v Department for Communities* [2020] NI Com 76 and the appeal was referred to a newly constituted tribunal.

5. The appeal was heard again and decided by a tribunal consisting of a LQM and a medically qualified member on 22 February 2024. The tribunal allowed the appeal, holding that the appellant had limited capability for work. At a later date the record of decision was corrected to record also that the tribunal did not accept that she had limited capability for work-related activity. The appellant requested a statement of reasons for the tribunal’s decision and this was issued on 30 May 2024. 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 2 July 2024. On 31 July 2024 the appellant applied for leave to appeal from a Social Security Commissioner.

 **Grounds**

6. The appellant submits that the tribunal has erred in law on the basis that:

 (i) she should have remained on incapacity benefit in 2014;

 (ii) it breached the rules of natural justice.

7. The Department was invited to make observations on the appellant’s grounds. Ms Toner of Decision Making Services (DMS) responded on behalf of the Department. She did not support the application on any of the grounds submitted. However, in the appellant’s interests, she submitted that the tribunal had potentially erred in law on the basis that the issue of capability for work-related activity was not considered fully. She indicated that the Department supported the application on that ground.

 **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 previous appeal papers, the ESA50 self-assessment questionnaire, an ESA 113 general practitioner factual report, the ESA85 HCP report, decisions, correspondence and the Commissioner’s decision. The tribunal had further correspondence and supporting documents from the appellant. The tribunal held an oral hearing, attended by the appellant, accompanied by her husband, and Mr Healy for the Department. The appellant indicated that she was prepared to proceed in the absence of a representative. The tribunal heard oral evidence.

9. Having considered the evidence, the tribunal decided that the appellant fell within the scope of regulation 29(2)(b) of the Employment and Support Allowance Regulations (NI) 2008 (the ESA Regulations) from and including 16 May 2017 on the basis that her mental health would be at real risk if she was to be found capable of work. It found that she did not have limited capability for work-related activity. It therefore allowed the appeal.

 **Relevant legislation**

10. 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 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. Regulation 34 further provides for an assessment of limited capability for work-related activity where, by reason of a claimant’s physical or mental condition, at least one of the descriptors set out in Schedule 3 applies to the claimant.

11. The tribunal in the present case found that regulation 29 applied to the appellant. This provides:

 29.—(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

 (2) Subject to paragraph (3) this paragraph applies if—

 (a) the claimant is suffering from a life threatening disease in relation to which—

 (i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and

 (ii) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure; or

 (b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work.

 (3) Paragraph (2)(b) does not apply where the risk could be reduced by a significant amount by—

 (a) reasonable adjustments being made in the claimant’s workplace, or

 (b) the claimant taking medication to manage the claimant’s condition where such medication has been prescribed for the claimant by a registered medical practitioner treating the claimant.

 (4) In this regulation “medical evidence” means—

 (a) evidence from a health care professional approved by the Department; and

 (b) evidence (if any) from any health care professional or a hospital or similar institution, or such part of such evidence as constitutes the most reliable evidence available in the circumstances.

12. A higher rate of ESA is applicable to persons who fall within the category of having limited capability for work-related activity. By regulation 35 of the ESA Regulations:

 35.—(1) A claimant is to be treated as having limited capability for work-related activity if—

 (a) the claimant is terminally ill;

 (b) the claimant is—

 (i) receiving treatment for cancer by way of chemotherapy or radiotherapy,

 (ii) likely to receive such treatment within 6 months after the date of the determination of capability for work-related activity, or

 (iii) recovering from such treatment and the Department is satisfied that the claimant should be treated as having limited capability for work-related activity; or

 (c) in the case of a pregnant woman, there is a serious risk of damage to her health or to the health of her unborn child if she does not refrain from work-related activity.

 (2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if—

 (a) the claimant suffers from some specific disease or bodily or mental disablement; and

 (b) by reasons of such disease or disablement, there would be a substantial risk to the mental or physical health of any person if the claimant were found not to have limited capability for work-related activity.

 **Assessment**

13. 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.

14. 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.

15. 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.

16. The appellant’s stated grounds are that in June 2014 she was transferred onto ESA from incapacity benefit (IB), but that because she was on IB on 3 April 2008 she should have remained on IB. This was not a matter that was before the tribunal, which was concerned with the question of whether the appellant’s capability for work or work-related activity was limited by her physical or mental condition. However, I will briefly address the issue.

17. ESA was established by the Welfare Reform Act (NI) 2007 (the 2007) Act from 27 October 2008. Following the introduction of ESA it was no longer possible to make a fresh claim for IB. Existing claimants of IB continued to be entitled to that benefit. However, broad regulation making powers were granted by Schedule 4 of the 2007 Act to convert existing awards, including IB awards, into ESA awards. In particular paragraph 7 provided:

 7—(1) Regulations may—

 (a) make provision for converting existing awards into awards of an employment and support allowance, and with respect to the terms of conversion;

 (b) make provision for the termination of existing awards in prescribed circumstances.

 (2) Regulations under sub-paragraph (1)(a) may, in particular—

 (a) make provision for conversion of an existing award—

 (i) on application, in accordance with the regulations, by the person entitled to the award, or

 (ii) without application;

 (b) make provision about the conditions to be satisfied in relation to an application for conversion;

 (c) make provision about the timing of conversion;

 (d) provide for an existing award to have effect after conversion as an award of an employment and support allowance—

 (i) of such a kind,

 (ii) for such period,

 (iii) of such an amount, and

 (iv) subject to such conditions,

 as the regulations may provide;

 (e) make provision for determining in connection with conversion of an existing award whether a person has limited capability for work-related activity.

18. Subsequently, the Employment and Support Allowance (Transitional Provisions and Housing Benefit) (Existing Awards) Regulations (Northern Ireland) 2010 (the Transitional Provisions Regulations) made provision for notifying existing IB claimants that their existing award was to be converted into an award of ESA if certain conditions were satisfied. These regulations applied to all claimants who, on or after 1 October 2010, were entitled to an existing award or awards, which included awards of IB. The process of conversion was conducted between 2011 and 2014. The administrative process involved giving affected claimants a notice commencing the conversion phase.

19. The appellant submits that whereas she had been told that all IB claimants were to be transferred to ESA, she was aware of people who continued to receive IB. She submitted that, therefore, she should still be on IB. However, the Transitional Provisions Regulations had general application, unless specific provision was made for excepted groups, and it is unclear who the appellant could be referring to. Regulation 4 of the Transitional Provisions Regulations made a notable exception in the case of claimants who would reach pensionable age before 6 April 2014. Such people were precluded from being given a notice commencing the conversion phase and were exempt from the process.

20. “Pensionable age” has the meaning given by the rules in paragraph 1 of Schedule 2 to the Pensions (Northern Ireland) Order 1995. In the case of the appellant, having regard to her date of birth which appears in the papers before me, her pensionable age is 67. She had not reached the age of 67 before 6 April 2014. She was therefore not excepted from the conversion process on account of her age. I consider that there is no merit in her submission that she should have remained on IB simply because she was receiving it on 3 April 2008, and I refuse leave to appeal on that ground.

21. Along with her OSSC1 form, the appellant has submitted copies of correspondence with the Health and Safety Executive for Northern Ireland, Belfast City Council, the Police Service of Northern Ireland, the Industrial Court, and the Appeals Service. She places reliance on legislation including the Social Security (Incapacity for Work) Regulations 1994, the Health and Safety at Work Act 1974, the Employment Rights Order (NI) 1996, the Employment Relations Act 2024, the Nationality and Borders Bill, the Human Rights Act 1998, the Equality Act 2018, the Social Security Act 1998, the Pensions Act 2014/15, the Data Protection Act 2018 and the Public Disclosure (NI) Order 1998. However, I am not satisfied that any of the material advanced or the legislation relied upon is relevant to the present case.

22. The tribunal was performing a relatively straightforward task of applying the relevant provisions of the ESA Regulations to the appellant’s case. The appellant has aired a very much broader set of issues – including matters such as whether her British Citizenship was removed – that are not remotely within the jurisdiction of the tribunal. Nowhere does she challenge the tribunal’s application of those provisions of social security law that do fall within its jurisdiction. I therefore do not accept that the appellant establishes an arguable case that the tribunal has erred in law.

23. However, Ms Toner for the Department has made some submissions in the appellant’s interests to the effect that the tribunal has arguably erred in law by failing adequately to address the issue of whether she had limited capability for work-related activity.

24. I accept that this is an arguable ground and I grant leave to appeal. However, this issue is a double-edged sword for the appellant. Her appeal to the tribunal was successful, in the sense that it overturned the decision of the Department not to award ESA on the basis of limited capability for work. Thus, if I were to allow the appeal and dispose of the appeal by referring it back to a newly constituted tribunal, the outcome would be that the appellant’s entitlement to ESA would cease, and be back in the hands of the new tribunal.

25. The basis of the present tribunal’s decision was that there would be a substantial risk to the physical or mental health of the appellant if she was found not to have limited capability for work. The tribunal considered the obvious difficulties for the appellant’s mental health arising from the workplace. Ms Toner points out that whereas the tribunal addressed the requirements of regulation 29(2)(b) of the ESA Regulations in allowing the appeal on the question of limited capability for work, the tribunal did not appear to address the requirements of regulation 35(2). She referred to the reported three judge panel decision of the Upper Tribunal in *IM v Secretary of State for Work and Pensions* [2015] AACR 10. At paragraph 105-106 the Upper Tribunal said:

“105. As indicated above, we accept the Secretary of State’s submission that, on an appeal I which regulation 3592) is in issue, he cannot be expected to anticipate exactly the work-related activity a particular claimant would in fact be required to do. This is axiomatic.

106. But what the Secretary of State can and should provide is evidence of the types of work-related activity available in each area and by reference thereto what the particular claimant may be required to undertake and those which he considers it would be reasonable for the provider to require the claimant to undertake. The First-tier Tribunal would then be in a position to assess the relevant risks”.

26. Ms Toner submitted that the tribunal should have ensured that they had necessary information before them regarding the types of work-related activities available to the appellant in her local area. She submitted that the tribunal had failed in its inquisitorial jurisdiction and erred in law.

27. I have to accept that there is force in Ms Toner’s submission. Whereas she invites me to determine the appeal myself, I consider that I do not have sufficient evidence relating to the issue of the types of work-related activity available to the appellant to do so.

28. I accept the submission that the tribunal has erred in law by failing to address the evidence necessary to determine the regulation 35(2) issue. It follows that I must allow the appeal and set aside the decision of the appeal tribunal. In the absence of relevant evidence, and because a tribunal involves a medically qualified member who can provide relevant expertise that is helpful in a case such as the present one, I refer the appeal to a newly constituted tribunal for decision.

29. In addition to reconsideration of all the issues, and in particular regulation 29, the new tribunal must have regard to regulation 35 of the ESA Regulations. In order to facilitate the tribunal in determining the appeal, I direct the Department to provide it with evidence of the types of work-related activity available in the appellant’s area and, by reference thereto, what the particular appellant may be required to undertake, and those which it considers it would be reasonable for the provider to require the appellant to undertake.

(Signed): O STOCKMAN

COMMISSIONER

10 March 2025