GT-v-Department for Communities (ESA) [2017] NICom 9

Decision No: C12/16-17(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 5 February 2016

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant’s application for leave to appeal from the decision of an appeal tribunal sitting at Enniskillen on 5 February 2016.

2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

 **REASONS**

 **Background**

3. The applicant claimed employment and support allowance (ESA) from the Department for Social Development (the Department) from 7 May 2015 by reason of rheumatoid arthritis. On 18 May 2015, the applicant was sent a questionnaire by the Department regarding her ability to perform various activities, which she completed and returned. On 3 July 2015 a health care professional (HCP) examined the applicant on behalf of the Department. On 25 August 2015 the Department considered all the evidence and determined that the applicant did not have limited capability for work (LCWA) from and including 25 August 2015, and made a decision superseding and disallowing the applicant’s award of ESA. The applicant appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 5 February 2016. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal’s decision and this was issued on 19 April 2016. The applicant 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 1 June 2016. On 13 June 2016 the applicant applied for leave to appeal from a Social Security Commissioner.

 **Grounds**

5. The applicant submits that the tribunal has erred in law on the basis that:

 (i) it did not explain why it rejected the medical evidence of the applicant’s general practitioner and her consultant rheumatologist;

 (ii) it irrationally preferred the evidence in the ESA85 healthcare professional report;

 (iii) it disregarded case law on Mobilising (CE/5661/2014);

 (iv) it disregarded case law on Picking up and moving (CE/2057/2014).

6. The Department was invited to make observations on the appellant’s grounds. Mr Collins 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**

7. The tribunal had documentary material before it including the Department’s submission, a submission from the appellant’s representative, various Med 3 sick lines, a letter from a consultant rheumatologist (25.11.15), a patient summary print out from GP records, an appointment letter with Respiratory Investigations Team, a letter re Rituximab treatment, a referral to haematology and information about MGUS (monoclonal gammopathy of undetermined significance). The appellant and her daughter attended and gave oral evidence. The disputed activities were Activity 1 (Mobilising), Activity 2 (Standing and sitting), Activity 4 (Picking up and moving) and Activity 5 (Manual dexterity).

8. The tribunal accepted that the applicant suffered from rheumatoid arthritis, constipation, chest pain, breathlessness, tiredness and MGUS. It found that MGUS, constipation and chest pain were functionally irrelevant. The tribunal addressed criticisms which the applicant made of the HCP report, agreeing that the HCP appeared to be under a misapprehension that the applicant suffered from generalised osteoarthritis rather than rheumatoid arthritis. It found that the HCP appeared to underestimate the applicant’s difficulties with “Mobilising”, in particular. Nevertheless it found that it was an accurate description of what the applicant told the HCP, of her typical day at the relevant time and of the examination that took place. It formed the view that the applicant was reasonably active at the date of the Department’s decision.

9. The tribunal accepted on the evidence that the applicant probably would not repeatedly mobilise 200 metres within a reasonable timescale, taking into account the lack of referral to occupation therapy or physiotherapy, the lack of mobility aids and the fact that she did not hold a blue badge, in addition to no findings of muscle wasting on examination. It awarded 6 points for this activity.

10. The tribunal found that the applicant should be able to sit for more than an hour despite difficulties with her spine and lower limbs. The tribunal declined to accept the applicant’s evidence regarding inability to move position from one seat to another, finding that the restriction claimed was not borne out by the evidence before it, and awarded no points for “Standing and sitting”. The tribunal found that the applicant had no abnormality of functioning in her upper limbs which would lead to an award of points for “Picking up and moving”, noting the representative’s submission at hearing that the test was wrongly put to the applicant. The tribunal further declined to accept that the applicant had limitations with “Manual dexterity” to the extent claimed.

 **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.

 **Assessment**

12. 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.

13. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

14. 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.

15. The first ground advanced by the applicant is that the panel overlooked/did not explain why it rejected the medical evidence from both the applicant’s GP – who provided four Med 3 forms for a continual period from 7 May 2015 to 24 February 2016 certifying that the applicant suffered from rheumatoid arthritis and that she would be unfit for work for the relevant periods – and the applicant’s consultant rheumatologist who confirmed that the applicant suffered from “seropositive rheumatoid arthritis which causes joint pain and swelling”.

16. The tribunal statement of reasons at paragraph 2 says “we find, as a matter of fact, that, at the date of the Department’s decision, the appellant suffered from rheumatoid arthritis…”. It is therefore evident that the tribunal made findings in accordance with the evidence which the applicant asserts it overlooked and that it did not “reject” that evidence. I consider that there is no merit in this ground.

17. The second ground advanced by the applicant is that the panel preferred the findings of the ESA85 HCP report, despite obvious errors being pointed out by the appellant and the representative. The applicant relied on CE/4174/2013 in support of her submission that the tribunal had erred in law on this ground.

18. The applicant does not particularise the “obvious errors” relied upon. On the papers before me, I consider that these could fall into two categories – those accepted by the tribunal and those rejected by the tribunal. Firstly, as referred to above, the HCP has referred to a “musculoskeletal problem”, saying that the applicant has “generalised arthritis”. Secondly, the applicant disputed various aspects of the information recorded by the HCP – namely the duration of the examination, that she left work due to redundancy, that she did not discuss using stairs as she lives in a bungalow, that showering was not discussed, that her daughter helped her to dress, using a washing machine was not discussed, driving was not mentioned, that she told the HCP that she could not lift milk, kettles, etc., that she did not recall mentioning going to Iceland [the shop] to the HCP, that she told the HCP that she could not use a bank machine or handle coins, and that the HCP did not record that she had to go to bed every day. She further disputed aspects of the examination, saying that her legs were not examined.

19. As far as the first matter is concerned, this was clarified at the hearing before the tribunal. The submission that the HCP report contained an error was accepted by the tribunal. The tribunal records:

“We accept that the HCP appeared to be under the erroneous that the appellant was suffering from generalised osteoarthritis (as opposed to the rheumatoid arthritis confirmed in the evidence from her consultant rheumatologist and GP) and that because of this the HCP had underestimated at least to an extent the appellant’s difficulties with mobility…”.

20. The tribunal therefore did not accept the findings of the HCP in an uncritical way and accepted that there was an obvious error in this respect. It made findings accordingly, and I do not see that there is any error of law arising from those findings.

21. As far as the second aspect is concerned, the submission that the HCP report contained errors was not accepted by the tribunal. The tribunal found that the HCP report gave a very detailed and specific description of the applicant’s typical day and that it resonated with details given in the applicant’s written submission to the tribunal. It further relied upon the fact that the applicant had not made any complaint about the HCP report to the Department.

22. In support of these grounds, the applicant relied on CE/4174/2013, which is *NH v Secretary of State for Work and Pensions* [2014] UKUT 14 – a decision of the late Upper Tribunal Judge Williams. That case involved an examination which did not address the applicant’s mental health condition and dealt badly with aspects of her physical condition. The Upper Tribunal Judge accepted that the HCP report was unreliable and set aside the decision of the appeal tribunal. In principle, I accept the approach of the Upper Tribunal in that case. A tribunal may err in law if it places weight on an unreliable report. However, each case of this kind will turn on its own facts.

23. In the present case, the applicant brought the matters in dispute squarely before the tribunal. However, these were expressed in a manner which was not forthright, in the sense that she denied saying certain things to the HCP, but did not make any assertion as to what she would say if asked the same question. Thus, she denied saying to the HCP that she could lift milk and kettles, but her evidence to the tribunal was that she could lift a litre of milk. She denied saying to the HCP that she could use a bank machine or handle coins, but told the tribunal that she would have been able to pick up a £1 coin albeit with difficulty. She denied that she had discussed driving with the HCP, but accepted that she could drive. Thus aspects of the applicant’s evidence to the tribunal undermined her written submission in advance of the hearing.

24. The applicant further denied any recollection of talking about shopping at Iceland, as recorded by the HCP, but told the tribunal that she did shop at Iceland. She asserted that showering was not discussed with the HCP, yet she indicated that she did use the shower. I consider that some specific aspects, such as whether the applicant washed her hair in the shower were not determined by the tribunal. However, as this would only have relevance for Activity 3 (Reaching), and as the activity of Reaching was not in dispute, I do not see that as a material omission.

25. Against this background, the tribunal did not accept the applicant’s criticisms of the HCP report to the extent that she said it was perfunctory and as to its duration and to the extent that she said that certain aspects of the examination had not taken place. It noted that the applicant’s evidence to the tribunal resonated with the account given to the HCP, and found that the applicant had given the account that the HCP recounted in the report. In this regard, I conclude that the tribunal made findings which were open to it on the evidence. It had the advantage of seeing and hearing directly from the applicant. It was entitled to reject the applicant’s criticisms of the HCP report and to make the findings that it did. I accept that this is an arguable ground and I grant leave to appeal on it. However, for the reasons I have given, I do not accept that the tribunal has erred in law on this ground.

26. The third ground relied upon by the applicant is that the tribunal has erred in law in its approach to Activity 1. She relies upon CE/5661/2014, which is *GL v Secretary of State for Work and Pensions* [2015] UKUT 503. In that case, Upper Tribunal Judge Markus QC held that a tribunal had erred in law by finding that any walking carried out while experiencing significant discomfort or exhaustion was to be disregarded for the purpose of the activity of Mobilising.

27. The tribunal in the present case made findings on the evidence that the applicant could have mobilised more than 200 metres on level ground “without stopping to avoid significant discomfort or exhaustion”. However, it accepted that she would have difficulty repeatedly mobilising this distance because of significant discomfort, awarding points under Activity 1(d)(ii).

28. The applicant’s submission is somewhat obliquely stated, but as I understand it, the point relied on is that the test of mobilising in the second limb of each of functional descriptors 1(a)(ii) and 1(c)(ii) should not be taken as disregarding any walking done despite significant discomfort or exhaustion. However, I can see nothing in the statement of reasons to suggest that the tribunal has fallen into this error as alleged. In particular, the tribunal did not accept the credibility of the oral evidence of the applicant, but based its findings on the factors I set out above at paragraph 9 above. It further based its findings on the HCP’s examination findings that there was no evidence of muscle wasting in the applicant’s lower limbs suggestive of a sedentary lifestyle. I do not accept that the applicant establishes an arguable case on this ground.

29. The applicant’s final submission refers to CE/2057/2014, which is *MT v Secretary of State for Work and Pensions* [2014] UKUT 258, in relation to Activity 4(c). That concerns the question of whether activity 4(c) refers to the use of one arm or two. Again the applicant presents this ground in a rather oblique way.

30. In the present case, it appears that the applicant was asked by the tribunal whether she could have slid an empty cardboard box along a table. At hearing, the applicant’s representative correctly challenged the use of this question and it appears that the tribunal accepted this, where it says in the statement of reasons:

“We note that at the oral hearing the appellant accepted on questioning that that [sic] she could have slid an empty cardboard box along a table. This activity is, however, intended to reflect an ability to pick up and transfer articles; not slide them. This was correctly pointed out by the appellant’s representative at the oral hearing when she alleged that the appellant could not have picked up and moved a large empty box. We are, however, satisfied, on the basis of the HCP findings of no abnormality, that the appellant could have undertaken this task at the date of the Department’s decision”.

31. Contrary to the factual scenario in *MT v Secretary of State for Work and Pensions,* the tribunal did not consider that the applicant could pick up a box with one arm, but rather that a lack of any evident abnormality in the functioning of her upper limbs meant that she could pick up and move an empty cardboard box with two arms. I see no merit in this ground.

32. As indicated above, I consider that the applicant has presented one arguable ground and I grant leave to appeal. However, the ground advanced is not sufficient to vitiate the decision of the tribunal and I disallow the appeal.

(signed) O Stockman

Commissioner

20 February 2017