MD -v- Department for Communities (ESA) [2025] NICom 13

Decision No: C7/24-25(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 26 April 2024

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I give leave to appeal and allow the appeal against the decision of the Appeal Tribunal (the tribunal) sitting at Ballymena on 26 April 2024 under reference BM/583/23/51/P. That decision is set aside and the appeal is remitted to a fresh panel of the tribunal, which must be wholly differently constituted. The new panel will consider the matter entirely afresh; the fact that the appeal before me has been allowed on a point of law should not be understood as indicating the eventual outcome, one way or the other.

2. The appellant had appealed to the tribunal against the decision by the Department for Communities (the Department) dated 28 December 2022 that she did not have limited capability for work (LCW) or limited capability for work related activity (LCWRA). The tribunal concluded that she did have LCW but did not have, nor could be treated as having, LCWRA. It awarded 6 points each for activity 4 (picking up and moving or transferring by use of the upper body and arms), activity 15 (getting about) and activity 16 (coping with social engagement due to cognitive impairment or mental disorder).

3. The appellant’s representative from Law Centre NI had put forward a written submission that:

“the application of Regulation 31 [i.e. of the Employment and Support Allowance Regulations (Northern Ireland) 2016] be considered should sufficient points not being awarded under Schedule 2 or transference under Schedule 3.

The Court in [*Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42] highlighted that in some cases (but probably not many) the mere giving of a negative decision may in itself create a substantial risk that would mean reg 29(2)(b) was satisfied:

‘where the very finding of capability might create a substantial risk to a claimant’s health or that of others, for example where a claimant suffering from anxiety or depression might suffer a significant deterioration on being told that the benefit claimed was being refused’ (para 34).”

4. Regulation 31(2) provides:

“(2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 30(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 reason 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.”

5. The medical evidence highlighted in the submission referred almost exclusively to the appellant’s physical conditions - shoulder tendonitis, cervical spondylosis, low back pain and sciatica though these were said - without further detail - to have affected her mental health. As regards the physical issues, the evidence was that they were “unlikely to improve enough to allow [the appellant] to return to work” and that “future retirement on medical grounds should definitely be considered”. As the case is being remitted, I do not comment further on the evidence.

6. Neither the tribunal’s record of proceedings nor the note taken by the appellant’s representative suggest that the basis on which reg 31(2)(b) was being submitted to apply was developed or made more explicit during the hearing.

7. The tribunal’s reasoning on LCWRA was brief:

“The tribunal awarded no points under schedule 3 and did not accept that the appellant was entitled to be placed in the support group.

Also, Regulation 31 did not apply.”

8. The appellant appeals on two grounds:

 a. the appeal tribunal misrecorded, and so failed to take into account, relevant evidence; and

 b. the tribunal gave insufficient reasons for holding that reg 31 did not apply.

9. In the usual way, the application for leave was sent to the Department for comment and in a submission dated 23 October 2024 Davy McKendry indicated that the Department did not support the appeal on ground a. but did so on ground b.

10. As I am allowing the appeal on ground b., I need not dwell on ground a., beyond observing that even if the tribunal did make the mistake alleged (omitting a vital “not”, plus a typo as to the date concerned) it is not evident how that error would be material when the appellant had scored 18 points anyway under schedule 2, and to meet the relevant schedule 3 descriptor would require her to meet the condition that “Engagement in social contact is always precluded due to difficulty relating to others or significant distress experienced by the claimant”, a demanding test for which such of the evidence as has been brought to my attention provides no support.

11. Mr McKendry supports the appeal on ground b. substantially by reference to the decision of Deputy Commissioner Gray in C5/23-24 (ESA). At para 14 she observed that:

“The tribunal must consider, and show that it has considered, regulation 31(2) when dealing with an appeal where it might apply. This is clearly such a case, given the schedule 2 descriptors based on mental health problems that were found to apply to the claimant…”

12. At para 15, explaining why the decision of that appeal tribunal was inadequate:

“The brief reference to there not being a risk to the appellant’s health because he has no history of self-harm does not fully answer the question posed by the regulation, because it concentrates on one narrow (albeit important) area of potential risk The remit of the provision is wider, encompassing other aspects of risk to health, such as a marked exacerbation of existing physical or mental health conditions” (emphasis added).

13. In the case before me, the tribunal by awarding descriptor 15c had acknowledged that the appellant claimant “is unable to get to a specified place with which the claimant is unfamiliar without being accompanied by another person.” By awarding descriptor 16c it had acknowledged that “engagement in social contact with someone unfamiliar to the claimant is not possible for the majority of the time due to difficulty relating to others or significant distress experienced by the claimant”.

14. The evidence before the tribunal included the Department’s paper headed “Are you on Employment and Support Allowance and in the Work Related Activity Group? We can offer you help and support” and a paper headed “Menu of services available to clients in the ESA Work Related Activity Group”. Some of the activities listed in those two papers were undoubtedly capable of requiring “engagement in social contact with someone unfamiliar to the claimant” and/or getting to an unfamiliar place. There were therefore in the light of the tribunal’s other findings issues requiring to be addressed, as to the work-related activity the appellant might be required to undertake, whether it would involve the activities which the tribunal had found she could not manage and the consequences for her health if she had to do them.

15. The degree of detail required of a tribunal’s reasons when addressing reg 31 (or similarly-structured provisions such as reg 29 of the Employment and Support Allowance Regulations 2008 in Great Britain) depends on the circumstances of the case. An indication of the degree of detail required in many cases can be found in Upper Tribunal Judge White’s observations in *NS v SSWP (ESA)* [2014] UKUT 115 (AAC) [2014] AACR 33:

“51. I do not consider that the level of detail required for proper reasons on the application of regulation 29(2)(b) is high. The more obvious it is that regulation 29(2)(b) does not apply, the easier it should be to give reasons why that is so.

52. What is frequently missing from brief statements that regulation 29(2)(b) does not apply is the addition of a statement as to why it does not apply. This is exemplified by the statement in the appeal before me, where the tribunal said:

“Regulation 29 does not apply as the Tribunal was not satisfied that there was a substantial risk to the appellant or to any person if he were not found to have limited capability for work.”

53. What is needed is for that sentence to end in a comma and to be followed by the word “because” and then a phrase or two explaining why regulation 29(2)(b) does not apply. After all, if the tribunal has done a proper job in considering regulation 29(2)(b) they must have considered why the regulation did not apply. Otherwise, this is a mere formulaic response to the issue. A tribunal which embarks upon a consideration of regulation 29(2)(b) must do a proper job of considering it.”

16. In the present case, the tribunal needed to address the grounds submitted why reg 31 should apply, limited as they appear to have been, and might have been able to do so in fairly brief terms, but a bald statement that reg 31 did not apply was insufficient. In view of its findings and the points it awarded, it also needed to address why it considered nonetheless reg 31 did not apply to the appellant. For (in particular) the latter reason, I allow the appeal and set the tribunal’s decision aside.



(Signed): C G WARD

DEPUTY COMMISSIONER (NI)

1 April 2025