

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 28 February 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal and appeal from the decision of an appeal tribunal sitting at Belfast.
2. For the reasons I give below, I grant leave to appeal. However, I do not accept that the tribunal has erred in law and I disallow the appeal.

REASONS

Background

3. The appellant claimed employment and support allowance (ESA) from the Department for Social Development (the Department) from 3 June 2017 by reason of having only partial sight. On 22 June 2017 the appellant completed and returned an ESA50 questionnaire to the Department regarding ability to perform various activities. The Department obtained an ESA113 factual report from the appellant's general practitioner (GP) on 28 July 2017. On 3 August 2017 a health care professional (HCP) examined the appellant on behalf of the Department and prepared an ESA85 report. On 16 August 2017 the Department considered all the evidence and determined that the appellant did not have limited capability for work (LCWA) from and including 16 August 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. The appellant appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 28 February 2018. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 4 June 2018. 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 18 September 2018. On 4 October 2018 the appellant applied for leave to appeal from a Social Security Commissioner.

Grounds

5. The appellant submits that the tribunal has erred in law on the basis that it gave insufficient weight to an optometrist's clinical findings, submitting that on the evidence she should have been awarded 15 points under descriptor 7(b).
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 erred in law for reasons other than those advanced by the appellant and indicated that the Department supported the application. In light of this support, I grant leave to appeal.

The tribunal's decision

7. 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 the ESA50 self-assessment questionnaire, an ESA113 report from the appellant's general practitioner (GP), some optometry reports, including a report dated 17 November 2016, and the ESA85 HCP report. The appellant attended the hearing and gave oral evidence. The ESA 50 indicated a dispute with the activities of "Understanding communication", "Navigation", "Learning how to do tasks", "Awareness of hazards" and "Initiating and completing personal actions". The appellant accepted the contents of the HCP assessment, indicating that she had problems with the activity of getting around safely, depending on light conditions. She told the tribunal that she could drive alone unsupervised, but sometimes had difficulty navigating in poor light. She agreed that descriptor 8(d) applied to her – i.e. a non-scoring descriptor. The appellant submitted that regulation 29 or 35 might apply to her.
8. The tribunal found that the appellant suffered from sight impairment having eyesight problems from birth. It noted her daily activities, which included driving unsupervised, playing golf, watching TV, using a mobile phone to call and text and dealing with post. It found that the appellant accepted in oral evidence that she is not restricted in mobilising, observed that she communicated easily with the panel and provided documentary evidence. It found that she had some difficulty

understanding a simple message from a stranger due to sensory impairment (6 points). It found that she could get around safely. The appellant accepted that she had no mental or cognitive impairment. The tribunal found that regulation 29 was not satisfied. Accordingly, it disallowed the appeal.

Relevant legislation

9. 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. The particular activity in issue in this case is activity 7. The relevant descriptors from 28 January 2013 were as follows:

PART 1
PHYSICAL DISABILITIES

(1)	(2)	(3)
<i>Activity</i>	<i>Descriptors</i>	<i>Points</i>
7. Understanding communication by— (a) verbal means such as hearing or lip reading) alone,	(a) Cannot understand a simple message due to sensory impairment, (such as location of a fire escape.	15
(b) non-verbal means (such as reading 16 point print or Braille) alone, or	(b) Has significant difficulty understanding a simple message from a stranger due to sensory impairment.	15
(c) a combination of (a) and (b), using any aid that is normally, or could	(c) Has some difficulty understanding a simple message from a stranger	6

reasonably be, used,
unaided by another
person.

due to sensory
impairment.

(d) None of the above 0
apply.

Hearing

10. I held an oral hearing of the application. The appellant attended unrepresented and made submissions on her own behalf. Mr Collins appeared for the Department. I am grateful to both of them for their assistance.
11. The appellant challenged the approach adopted by the tribunal to the evidence before it and also challenged a number of aspects of the procedure adopted in her case both prior to and at the tribunal hearing.
12. The appellant explained that she had suffered from visual impairment from birth. She had eligibility for free eye tests and was prescribed complex lenses, and fell into the category of people who had severe visual impairment. She submitted that the fact that she was prescribed complex lenses indicated that she had comparably limited vision to someone who had a certificate of vision impairment (CVI). She submitted that the evidence that she had provided to the tribunal would have justified a finding that she should be awarded 15 points for descriptor 7(b).
13. In written submissions the appellant submitted that she had not been referred for a medical examination for the purposes of the work capability assessment (WCA), and therefore that regulation 6(2)(q) of the Social Security (Decisions and Appeals) Regulations (NI) 1999 did not apply to her. These were not pursued at hearing, but in any event it is plain from the papers that the appellant was examined by a HCP and that the supersession was lawfully based.
14. The appellant at hearing indicated that she had been able to read documents such as the Departmental submission in 16pt print with her complex lenses or with a magnifying glass which she habitually carried. However, she indicated that the 16pt size print was not commonly available to her in day to day life.
15. She submitted that the tribunal had used an incorrect score sheet. She noted that the sheet used referred to 2011 Regulations and that the heading was inaccurate. The word "alone" was omitted in the heading on the tribunal score sheet and the distinct hearing and vision categories were put together.
16. She further submitted that the clerk to the tribunal had not fulfilled his role on the date of hearing. She submitted that the clerk should have signed the record of the proceedings and should have been present. However,

she submitted that the clerk remained outside the hearing room. She submitted that the clerk had an official role and should have been present throughout the hearing. She referred to regulation 37 but was unable to identify the particular set of social security regulations that it appeared in. She submitted that the clerk had a judicial function, but had absented himself when he should have been there, and that there was a breach of natural justice as a result.

17. Mr Collins submitted that the previous case law indicated that a tribunal should refer to medical evidence and explain why it has rejected it, referring to C16/08-09(DLA) at paragraph 54. While he had no particular knowledge of the significance of the evidence of the optometrist, he felt that the lack of reference to it was potentially erroneous in law.
18. He submitted that the decision-maker's score sheet may have expressed the statutory test inaccurately but was a shorthand version of the relevant test. In any event it was not the tribunal that had produced it.
19. Turning to the tribunal's score sheet, he acknowledged that the test was not set out precisely, but that there was nothing to suggest that the tribunal had misapplied the statutory test.
20. In relation to the clerk's role, Mr Collins submitted that the role was purely administrative. He submitted that the fact that the clerk was not in the room was not a relevant factor.

Assessment

21. The appellant firstly submits that the tribunal has erred in law by failing to give enough weight to the optometrist's report of 17 November 2016. Mr Collins has offered support for that proposition. The basis of Mr Collins' support is the lack of reference by the tribunal to the optometrist's report in their reasoning.
22. He refers to the well-known statement of Chief Commissioner Mullan in C16/08-09(DLA), where he said at paragraph 54 that:

“there is a clear duty on appeal tribunals to undertake a rigorous assessment of *all* of the evidence before it and to give an *explicit* explanation as to why it has preferred, accepted or rejected evidence which is before it and which is relevant to the issues arising in the appeal”.
23. It should be recalled that the circumstances in C16/08-09(DLA) involved a supersession of DLA following a fraud investigation. The Department had submitted video evidence of the appellant in daily life that had been recorded covertly. The particular appellant had submitted medical evidence of his physical condition in response, but whereas the tribunal had referred to the video evidence, it made no reference to the medical evidence in its statement of reasons.

24. It is evident that a range of material may be before a tribunal that can fall into the general description of medical evidence. This could include medical appointment letters, for example. However, such letters have little evidential value except to corroborate that a particular referral has been made or that a particular investigation is to be conducted. I would not consider that a simple failure to refer to such evidence is erroneous in law. Other evidence might include reports confirming a particular diagnosis. However, where the diagnosis is not contentious and where the tribunal is focussed on how the condition affects the individual appellant, I would not consider that the omission to refer to the evidence of diagnosis amounts to an error of law.
25. It is plain that where medical evidence is relied on by an appellant which is contentious, in the sense that it contradicts or contrasts with alternative medical or non-medical evidence before the tribunal, that it must be referred to by the tribunal. Conflict in evidence must be resolved and the reasons for a tribunal preferring the particular evidence that supports its conclusions must be explained adequately, however briefly.
26. In the present case, the appellant relied on an optometrist's prescription. This indicated that she needed glasses for driving and close work. It assessed visual acuity as 6/9+ in the right side and 6/7.5- in the left side. The appellant indicated that this was her visual acuity assessed while wearing corrective lenses. She submitted that she had been prescribed complex lenses by the prescription.
27. The test of visual acuity that the tribunal had to apply in relation to the appellant's vision is set out in activity 7. This provides for three scoring descriptors. In evidence to the tribunal the appellant indicated that she could identify a fire escape (descriptor 7.a) and she does not contend that this applies to her. Descriptor 7.b would apply if the appellant would have significant difficulty understanding a simple message from a stranger written in 16pt print (equivalent to print which is 16/72 of an inch high), using any aid that she normally used or could reasonably use. Descriptor 7.c would apply if she would have some difficulty understanding a simple message from a stranger written in 16pt print, using any aid that she normally used or could reasonably use.
28. As the activity heading confirms, the test had to be applied to the appellant wearing glasses or using the magnifying glass that she habitually uses. The tribunal found that descriptor 7.c applied, in the context of her confirming that she can read small print with glasses and a magnifier.
29. The tribunal has not made express reference to the optometrist's prescription. What the prescription does is to indicate the characteristics of the corrective lenses needed by the appellant to improve her sight to an optimum level. In other words it dictates the level of the aid that she requires. However, since the test applied by the tribunal is premised

upon the appellant using the level of aid prescribed, and since she uses the complex lenses prescribed by the optometrist, it appears to me that there is no contentious aspect to the particular piece of evidence.

30. The appellant had accepted before the tribunal that she could read small print when aided with appropriate lenses in her glasses and magnifier. In the course of the proceedings and the oral hearing before me, it was plainly evident that the appellant was able to read 16 point print, and indeed smaller, and to write 16 point print. It does not appear that the tribunal has made an irrational decision in holding that the appellant would have some, but not significant, difficulty in terms of a message written in 16pt print. That finding was clearly open to it.
31. I understand why Mr Collins has made the submissions that he has in support of the application by the appellant. However, it appears to me that the tribunal has not overlooked contentious evidence or failed to consider evidence relevant to the questions before it. As indicated, the prescription merely indicated the level of the aid that the appellant used when reading. Since the test had to be applied as if the appellant was using the particular aid, I do not consider that the tribunal has materially erred in law.
32. The appellant has submitted that the pro forma score sheet used by the tribunal contains material defects amounting to errors of law. She points to the foot of the page which reads "AT3D'ESA – 2011 Regulations". She submits that the tribunal has applied the 2011 Regulations to her, when the correct regulations were implemented from 28.1.13. However, as I pointed out to the appellant at hearing, the top of the score sheet reads: "Physical Health Descriptors – Amended descriptors 28.1.13". It does not appear to me that there is any warrant for holding that the wrong descriptors were applied for this reason alone.
33. However, the appellant further submits that the heading used on the form to describe activity 7 is also wrong. It appears to me that she is correct to say that whereas the activity headings in the legislation are reproduced fully in relation to most of the physical activities, activity 7 is not fully reproduced. As the appellant submits, references to the precise hearing and sight tests in the pro forma score sheet and the legislation are different.
34. The legislation makes reference to verbal means and non-verbal means, when it presumably intends to refer to oral and non-oral means, and for ease of reference I shall refer to communication by speech and by writing. To paraphrase it, the legislation refers to communication in terms of understanding speech alone and understanding writing alone or by a combination of the two aspects. The pro forma, by contrast, simply refers to understanding by speech or sight.
35. I consider that the content of the forms used by the Appeals Service are a matter for that body. I understand that it may have been considered

necessary to make a précis of activity 7 on the form for reasons of space. I consider, however, that if it were to appear that a tribunal has been misled into applying an incorrect test by such a summary, an error of law would potentially arise.

36. In the present case the appellant maintained that she had no difficulty with hearing speech. This means that the tribunal was concerned to apply the sight test alone. Difficulties arising from the combined effects of hearing and sight disabilities do not therefore arise. The lack of a reference to any such combined difficulties in the pro forma is therefore immaterial in this case. Similarly, the lack of a reference to the word “alone” in the pro forma is immaterial, since it would have been otiose in the context of an appellant suffering from a single sensory impairment. Therefore, I do not accept that the tribunal has erred in law for this reason.
37. The appellant further submits that the tribunal erred in law because the decision letter to her from the Department described activity 7 under the heading of “Hearing, or understanding messages”. She submitted that it made no reference to sight. When Mr Collins submitted that the letter was not the tribunal’s responsibility, but the Department’s, she submitted that the medical member of the tribunal had been misled by the wording.
38. It appears that the appellant has interpreted questions put to her about her hearing as indicating that the medical member of the tribunal has mistakenly understood her to have hearing problems. However, activity 7 encompasses both spoken and written communication. For completeness, the tribunal would reasonably have ascertained whether or not the appellant had hearing problems. The record of proceedings reports that she said that her hearing “is fine”. I do not consider that this indicates any misunderstanding of the legal test on the part of the tribunal.
39. The Department’s letter paraphrases and simplifies the nature of the relevant test. The Department is entitled to communicate in this manner and I cannot accept that the tribunal has erred in law for that reason.
40. Finally, the appellant has further questioned the role of the clerk to the tribunal. She was clearly aggrieved by the fact that the clerk left the hearing room shortly after bringing her into it, and that he did not remain throughout. She criticised the particular tribunal clerk for failing to attend to what she perceived to be his statutory function of recording the evidence at the hearing. She cited regulation 37 of an unspecified statutory provision. I believe that this was intended as a reference to regulations 37 of the Social Security (Decisions and Appeals) Regulations (NI) 1999. Her submission was that the rules of natural justice had been breached in her case as a result of the particular clerk’s conduct.

41. Regulation 37 of the Social Security (Decisions and Appeals) Regulations (NI) 1999 relates to the functions of the clerk to the tribunal. However, all that it says is set out below:

37. The Department shall assign a clerk to service each appeal tribunal and the clerk so assigned shall be responsible for summoning members of the panel to serve on the tribunal.

42. I am satisfied from the relevant legislation that the clerk to the tribunal performs purely administrative support functions for the tribunal and does not have a judicial role. It is the legal member who has responsibility for recording the evidence given at hearing, not the clerk, and the evidence in the particular appeal has been recorded to an appropriate standard. While it was the impression of the appellant that the clerk should have played a greater role, this is not reflected in the various relevant statutory responsibilities. I do not accept that it is arguable that the tribunal has erred in law on this basis.
43. As I do not accept that the tribunal has materially erred in law on any of the grounds advanced, I disallow the appeal.

(signed): O Stockman

Commissioner

16 September 2019