AL-v- Department for Communities (ESA) [2023] NICom 25

Appeal No: C4/23-24(ESA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT AND SUPPORT ALLOWANCE

Application to a Social Security Commissioner
for leave to appeal on a question of law from the decision of a Tribunal
dated 24 August 2022

DECISION OF THE SOCIAL SECURITY COMMISSIONER

I grant leave to appeal, on the basis that some of the points made are arguable. I deal with the substantive appeal, which I allow. I set aside the decision of the Tribunal sitting at Coleraine on 24 August 2022 as being in error of law. I remit the matter back to a freshly constituted Tribunal with the following directions.

Directions

1. The fresh appeal will be listed before a new tribunal with neither of the same members as previously. It will be an oral hearing, and it is in the claimant's interests to attend, either in person, by phone or virtually, as will be preferential or practical.

2. The claimant's representative is to state her preference for the hearing in writing (post or email as is usual) to the Appeals Service within 14 days of the issue of this decision.

3. A Chairman of the Appeals Service may make any further necessary listing directions.

REASONS

Background

1. The appeal below concerned entitlement to an Employment and Support Allowance under the Regulations (Northern Ireland) 2008 (hereafter "the ESA Regulations", or "the regulations"). The central issue was whether

the appellant had Limited Capability for Work Related Activities (LCWRA), under schedule 3, or, if not, whether the exceptional provision, regulation 35, applied to her.

2. She had made a claim for ESA from 3 November 2017 on the basis of anxiety. On 10 January 2019, the Healthcare Professional (HCP) conducting a work capability assessment had found sufficient difficulties to recommend that she be placed in the Support Group (that is, that she had LCWRA), and reassessed in about eighteen months, and a decision maker agreed.

3. Accordingly, following her completing a fresh ESA 50 form on 11 December 2021, the claimant underwent an assessment, this time over the telephone due to the COVID 19 restrictions then in place. That assessment was on 26 January 2022. The HCP was of the view that she had limited capability for work (LCW) but not for work related activities (LCWRA). On 2 February 2022, the decision maker accepted that recommendation and awarded points under schedule 2: 6 points for coping with change, 6 points for getting about, and 9 points for coping socially. She would therefore be expected to engage in work related activities.

4. With assistance from Mr O'Farrell of Advice North West, and following the mandatory reconsideration procedure which didn't change the decision, the claimant appealed; the appeal was heard on 24 August 2022.

5. The tribunal might have investigated all aspects of the decision, but, quite properly, it appears not to have done so: under Article 13(8)(a) of the Social Security (Northern Ireland) Order 1998, it need not investigate matters not raised by the appeal: the appeal was clearly claiming entry into the Support Group, and the Department had accepted the 21 points under schedule 2 referred to above. Its decision adopted the conclusion of the decision maker, that the claimant did have limited capacity for work, but could engage in work related activities. The application for leave to appeal to the Appeals Tribunal was refused.

Proceedings before the Commissioners

The relevant legislation

6. I need say only that the Tribunal was considering whether the appellant had limited capability for work or for work related activities, commonly abbreviated to LCW/LCWRA, under section 8(2) Welfare Reform Act (NI) 2007, regulation 15 Employment Support Allowance Regulations (NI) 2016, and the relevant regulations in relation to LCWRA. It is not necessary for me to set out the terms of the legislation in this case, as my decision is determined by procedural considerations.

Representation before me

7. I have been considerably assisted by the written submissions in this case from both Mr O'Farrell on the claimant's behalf, and Mr Finnerty for the Department. I have considered whether I should have an oral hearing to rehearse the arguments, but neither party has requested that. I do not think one is necessary in the interests of justice; I am able to decide the matter fairly on the papers before me, and, by common consent, at the same time as I determine the application for leave.

The arguments of the parties

The appellant

8. The application to the Commissioners has identified areas in which it is said that the tribunal fell into error of law which I paraphrase below.

   (i) by relying on the claimant's abilities and demeanour at the hearing, whereas the relevant date for consideration of her capability for work and for work related activities was the date of the decision under appeal, made some six to seven months before the tribunal hearing;

   (ii) that the tribunal failed to assess the medical evidence properly, in that it was irrational to deny her the award she had previously enjoyed in light of medical evidence that she remained on medication that was regularly reviewed and, indeed, had been increased during the period.

   (iii) that the written reasons failed to deal with the points made on the claimant's behalf,

The respondent

9. The respondent Department makes it clear that it does not support the appeal; however, Mr Finnerty has, as is proper, explained the background and the view adopted neutrally, and, consistent with that position, assesses the strengths of the appellant's arguments.

My focus

10. I am allowing the appeal on the third ground, which, although not supported by the Department was the point which Mr Finnerty clearly felt was the strongest: I agree with him, and I need deal only briefly with the other elements.

11. The date of decision point is dealt with by the record of proceedings in which it is noted that the claimant was asked about how she felt, compared to at that time, and responded that she was much the same. Further, the tribunal's reasons begin with the statement (in the second paragraph) that it could only take into account circumstances existing at the relevant date,

establishing that this matter was foremost in its considerations. The tribunal was entitled to proceed on the basis that there was no change identified, and it would have been able to rely on any material observations of her at the hearing, subject to the important natural justice points in relation to her having the opportunity to comment on them.

12. It is not all observations that must be identified during the hearing and offered for comment, but those which affect the decision of the tribunal. I have read the reasons with this in mind, and I am of the view that the points made with reference to her demeanour at the hearing were aside comments, and not the foundation of the facts found. The observations as to the claimant 'not being unduly anxious' appear in the context of her being able to cope with the tribunal process and answer questions satisfactorily, rather than being tied to any facts relevant to the legal tests the tribunal had to consider.

13. I have considered a point made in the submission of Mr Finnerty, that if the tribunal had, owing to the paucity of references to the claimant's mental health in her medical notes, assessed that on its observations of her at the hearing, then it was bound to put those observations to her. That would be so; but in my judgment that is not the position. The comments gleaned from the observation I have dealt with; the obvious reading of there being little by way of reference to her mental health, and the combining of that with the lack of onward referral for any mental health issue in contrast to physical problems where referrals were made, is that the tribunal inferred that her mental health problems were not severe, or in any event not so severe as to satisfy either a scoring descriptor in schedule 3 or the criteria of regulation 35.

14. That is a useful segway into the second point, the assessment of the medical evidence in that regard or others. I remind myself that the tribunal included a doctor, and the expertise of the panel demands respect. (*Department of Works and Pensions v Information Commissioner and Zola* [2016] EWCA Civ 758). Further, as the tribunal points out at paragraph 9 of its reasons, the level of medication is not necessarily a reflection of the level of functioning: the very purpose of medication is to improve symptoms, and, not infrequently, when properly medicated; that is, when the optimal dose of medication is found for an individual, their function improves. The question of the claimant's function was not, therefore, inexorably tied to the level of her medication, or any increase, but it was the task of the expert tribunal to assess that using, among other things, its medical experience.

15. I add further, that the tribunal was assisted by the claimant's full medical notes and was therefore in a position to contextualise any report made by the General Practitioner (GP) specifically for the hearing (for example, in the form ESA 113). The point is made by the tribunal that the records overall made little reference to the claimant's mental health problems. It was entitled to note the lack of referral in respect of mental health issues,

as opposed to physical symptoms for which referrals had been made, and to draw inferences from those matters, provided that they were explained.

16. The final set of points made related to the adequacy of the reasons provided by the tribunal, and it is that lack of adequate reasons that I find constitutes an error of law, and the need to set the decision aside and rehear the case.

The Tribunal's Role

17. Whilst there can be no expectation of an award simply because of a prior award, it is settled law in all parts of the UK that a tribunal should explain why there is a difference where an award is reduced or extinguished, unless that is apparent from other parts of the reasoning: *R(M) 1/96*; *Quinn v Department for Social Development* [2004] NICA 22.

18. I note the references to cases from the Upper Tribunal, in particular Upper Tribunal Judge Jacob's helpful observations as to dealing with the arguments made; there are different ways of achieving this, but, however it is done, reasons must explain to the losing party why they have lost: *Bassano v Battista* [2007] EWCA Civ 370 at para 28.

> "The duty to give reasons is a function of due process and therefore justice, both at common law and under Article 6 of the Human Rights Convention. Justice will not be done if it is not apparent to the parties why one has lost and the other has won. Fairness requires that the parties, especially the losing party, should be left in no doubt why they have won or lost."

19. So, I ask myself, has the tribunal communicated that? Will the claimant have been able to understand, on her reading of its reasons (with a knowledge of the background to the situation), what persuaded the tribunal that she was capable of engaging in work related activities, which was the issue in dispute. Given the tribunal accepted the various difficulties that she had in going out and about and engaging with other people, that are reflected by the score of 21 points in the three descriptors under schedule 2, has it explained why?

20. Whilst emphasising that I look at the reasons on the basis that they need to be adequate and not perfect, I am drawn to the conclusion that they are not.

21. The reasons are very brief. They set out the claimant's contention that she should have remained in the Support Group on the basis of her mental health, and then in a few short paragraphs, turn to why that contention is not accepted.

22. In the reasons the tribunal notes that the papers for the original decision of 2017 are not before it, but evidence of the continuation of that award

included a form ESA 113 from the claimant's GP indicating that she had "severe anxiety, social phobia and panic attacks." For this appeal a similar form was also completed, which said that she was "not fit for work due to severe anxiety and depression. Her medication for this has recently had to be increased."

23. The tribunal goes on to observe (as has been discussed above) that the medical records make "little or no reference to the Appellant's mental health." The tribunal accepts that medication was increased, but that did not of itself indicate a severe problem. It points out the lack of onward referral that I have also discussed in relation to another ground of appeal, and, on both these points I reiterate my view that the tribunal was entitled to take the view that it did; however, it needed to explain why it was taking that view, particularly given the previous awards.

24. The only real explanation offered was that, taking the conclusions of the disability assessor and "all the other evidence in the round" the tribunal felt that the conclusions that she had LCW but not LCWRA were "a fair reflection of her limitations". That is indeed a conclusion, but it is not an explanation. It doesn't tell the appellant why her own evidence of considerable functional limitation was not accepted, nor how the tribunal was able to reconcile her acknowledged significant limitations in three spheres of activity that might well be engaged were she required to do work related activity.

25. The paragraph following, as to whether regulation 35(2) should be applied was merely a recitation of the statutory test, and not an explanation as to why the claimant didn't fall within it.

Before the new tribunal

26. The tribunal comments that it was able to reach a reasoned conclusion despite the evidence of the 2017 award not being before it. As with any missing evidence the tribunal will do its best, but as the appeal is being remitted the Department should see if the old papers are available: they may well not be, as it is not good practice to keep documents indefinitely, but the tribunal should either be provided with the evidence, or informed as to why it cannot be.

27. If, in the intervening period, the claimant has been required to attend work related activities, there may be evidence as to how that has progressed, and, if so, it should be filed and disclosed to the claimant and her representative. Of course, such evidence will be from a time after the date of decision, but it might shed evidence on the likely position at that time, particularly given the evidence of the claimant before this tribunal that her mental health matters were similar at the date of hearing some six months after the date of the decision under appeal.

28. As always, I caution the claimant that success here on a point of law is no indication of what the result will be at the fresh tribunal, which is examining the facts.

(signed): P Gray

Deputy Commissioner NI

19 September 2023