

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

EMPLOYMENT 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 24 March 2023

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 LV/13393/22/51/P.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal 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

3. The appellant had been in receipt of employment and support allowance (ESA) from the Department for Communities (the Department) from and including 15 May 2013 by reason of diabetes, pain, vertigo and depression. On 7 August 2022 the appellant returned a completed ESA50 questionnaire to the Department regarding her ability to perform various activities. On 3 August 2022 a factual report was received from the appellant's general practitioner (GP). On 17 August 2022 a health care professional (HCP) conducted a telephone consultation with the appellant on behalf of the Department. On 18 November 2022 the Department considered all the evidence and determined that the appellant did not have limited capability for work from and including 11 August 2022, 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.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 24 March 2023. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 25 July 2023. 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 29 August 2023. On 8 September 2023 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:
 - (i) It gave inadequate reasons for explaining why it considered that paroxysmal vertigo did not limit her ability to perform descriptors one and two.
 - (ii) It did not explain why it considered that a reference to the stroke team was not an indication of the severity of her condition.
6. The Department was invited to make observations on the appellant's grounds. Mr Finnerty of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had erred in law as alleged and indicated that the Department supported the application.

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 GP report with further medical evidence, an ESA85 HCP report and an older ESA85 report from 2018. The tribunal had a submission from the appellant's representative and additional medical evidence from her GP. The appellant had waived her right to an oral hearing and therefore there was no oral evidence.
8. Having considered the evidence, the tribunal accepted that the appellant suffered from benign paroxysmal vertigo, diabetes (type 1), diabetic maculopathy, coeliac disease, osteoporosis, osteoarthritis, intercostal inflammation, varicose veins, anaemia and depression. While acknowledging that she had experienced symptoms of dizziness, light-headedness and occasional nausea, the tribunal did not accept that the severity of her symptoms was enough to score points for the activities prescribed in Schedule 2 of the ESA Regulations. It considered that the symptoms of benign paroxysmal vertigo are extremely short-lived. It noted an entry in her medical records relating to whether she could drive. While she had been referred to the stroke team for an MRI in September 2022, the tribunal considered that this was precautionary. It further found that none of the appellant's other physical or mental conditions impacted

significantly on her ability to carry out the functions in dispute. The tribunal then addressed the disputed physical and mental activities and concluded that the appellant could not be awarded points for any of the relevant descriptors. It therefore 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.

Assessment

10. 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.
11. 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.
12. 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.
13. The grounds relied upon by the appellant were that the tribunal did not give adequate reasons for its conclusion that paroxysmal vertigo did not cause sufficient limitation with descriptors one and two. She further submitted that the tribunal failed to explain why a referral to the stroke team was not an indication of the severity of her incapacity.
14. For the Department, Mr Finnerty advanced a submission in support of the appellant's case to the effect that the tribunal had failed to apply a "broad brush" approach to the evidence. He indicated that the Department supported the appellant on this ground. He further submitted that the fact that the appellant had not completed a recent ESA50 form may have amounted to an error of law. He made further reference to the tribunal's

findings about the appellant's ability to cope with change and her ability to drive.

15. Turning to the appellant's grounds first, she submits that the tribunal did not give adequate explanation "why my paroxysmal vertigo did not cause sufficient limitation with descriptors one and two". With regard to paroxysmal vertigo the tribunal had said:

"7. Our overall assessment, however, is that the appellant's vertigo during this period was not of a level of severity that would allow her to score points under the 2008 Regulations. We note that, on 15 September 2022, the appellant reported to her GP that her vertigo is lasting hours. This is consistent with the HCP report which indicates that when, in the past, the appellant would have experienced vertigo it would last for approximately two hours and that, although it presented her with not [sic] functional restrictions, she would have to go to bed until it passed. Benign paroxysmal vertigo, however, typically causes extremely brief episodes of dizziness. The symptoms tend to come and go and are commonly very short-lived. In this regard, we consider that the type of vertigo with which the appellant suffers is unlike other vertigo including conditions like Meniere's disease, not one which would have rendered her unable to function for prolonged periods of time.

8. The entry in the GP notes and records dated 10 October 2022 reinforces to us that, for the majority of the period in which the appellant's vertigo resurfaced, it was not so severe as to warrant an award of points. On that date, although the appellant reported that her vertigo is still bad, she asks her GP for advice on whether she can drive. This suggests to us that she was contemplating driving at that time. We don't think this is consistent with the suggestion made that she was debilitated by her vertigo. We acknowledge that the appellant's GP did refer her to the stroke team on 26 September 2022 for an MRI. We are, however, of the view this was [a] precautionary step by her GP given the appellant's continued symptoms but cannot be relied upon as an indication of their severity".

16. It appears to me that the tribunal explained in these paragraphs that it considered that the appellant's condition of paroxysmal vertigo was episodic and short-lived and found that her contemplation of driving was inconsistent with severe limitation due to vertigo. This is a clear explanation whether or not one agrees with it, and I consider that there is no merit in the submission that the tribunal has given inadequate reasons for this aspect of its decision. I refuse leave to appeal on this ground.

17. It is further submitted by the appellant that the tribunal has not explained why referral to the stroke team was not an indication of severity of incapacity.
18. I consider that it is self-evident that the fact of an individual being referred for or undergoing any particular medical investigation does not constitute evidence of the level of their functional disability. In the particular instance, the appellant had complained to her GP of loss of balance on 15 September 2022 and had been examined. When her symptoms were no better on the following day, the GP referred the appellant to A&E. There she underwent a CT scan, which was normal. Some ten days later, with symptoms continuing, the GP referred her to the stroke team for possible MRI investigation. However, having seen the appellant, in December 2022 the stroke team referred her to ENT instead. None of this is evidence of any particular level of disability or incapacity on the appellant's part. It is part of a process of medical examination for the purpose of excluding or confirming a particular diagnosis. It says nothing about the severity of the symptoms being experienced but simply that they are unexplained. The tribunal did not err in law by not finding that referral for investigation *per se* was suggestive of severe incapacity. I refuse leave to appeal on this ground.
19. Turning to the points advanced by Mr Finnerty in the appellant's interests, these are related to the tribunal's general approach to the issue of the variability of the appellant's condition in the appeal, the issue of driving as evidence of coping with change, and the lack of an up-to-date ESA50 self-assessment. In the light of the Department's support, which suggests that there is an arguable case of error of law, I grant leave to appeal.
20. Mr Finnerty submitted that between September 2022 and December that year, the appellant suffered a recurrence of her vertigo, and that it is a variable condition. He referred to the Great Britain Tribunal of Commissioners' (Chief Commissioner Machin QC, Sanders, Rowland) decision in R(IB)2/99, endorsed by a Northern Ireland Tribunal of Commissioners (Chief Commissioner Martin QC, Brown, Powell) in R2/04(IB). At paragraph 15 of R(IB)2/99 the tribunal of Great Britain Commissioners said:

"... Nevertheless, we agree that all the factors mentioned by counsel – the frequency of "bad" days, the length of periods of "bad" days and of intervening periods, the severity of the claimant's disablement on both "good" and "bad" days and the unpredictability of "bad" days – are relevant when applying the broad approach. Thus, a person whose condition varies from day to day and who would easily satisfy the "all work test" in three days a week and would nearly satisfy it on the other four days might well be considered capable of work for the whole week. But a person who has long periods of illness separated by periods of remission lasting some weeks, during which he

suffers no significant disablement, might well be considered incapable of work during periods of illness but not to be incapable of work during periods of remission. Each case must be judged on its merits ...”.

21. Mr Finnerty referred to the decision of Chief Commissioner Martin in *SAG v Department for Social Development* [2011] NI Com 171). He submitted that the decision (reported as [2012] AACR 6) further endorsed the “broad brush” approach to variable conditions as set out in R(IB) 2/99 and R 2/04 (IB)(T). He referred to the headnote of the reported decision which summarised the principle of the case as that:

“A tribunal should consider the claimant’s overall condition where they suffer from a variable condition. The proper approach to variable conditions was set out in R(IB) 2/99 and R 2/04 (IB)(T) and the approach taken in those incapacity benefit decisions was copper fastened by Upper Tribunal Judge Turnbull in AF v Secretary of State for Work and Pensions (ESA) [2011] UKUT 61 (AAC) in which the Upper Tribunal Judge held that the governing principles in the relevant incapacity benefit decisions should carry forward to employment and support allowance.”

22. The headnote of a case report does not form part of the judicial decision, but Mr Finnerty is nevertheless correctly summarising the principles involved in such cases, as the headnote is an accurate summary of these. Chief Commissioner Martin accepted the Department’s submission at paragraph 17 in *SAG v DSD*, which was to the effect that:

“the tribunal ought to have taken into account whether the particular activities can be performed with a degree of repetition and that, in light of the relevant issue of fibromyalgia in this case, the tribunal ought to have dealt with these issues using the broad brush approach as set out in R2/04(IB)(T)”.

23. More recently, the principle of taking a broad approach to a variable condition can also be observed as having been applied by Chief Commissioner Mullan in *DMcN v Department for Social Development* [2015] NI Com 27 and by myself in *LG v Department for Social Development* [2015] NI Com 63.
24. Mr Finnerty observed that in the present case, the appellant, on 15 September 2022, reported to her GP that her vertigo was lasting hours. At paragraph 7 of the Reasons for Decision the tribunal noted that this was consistent with the contents of the HCP report. However, the tribunal found at paragraph 7:

“Benign paroxysmal vertigo, however, typically causes extremely brief episodes of dizziness. The symptoms tend

to come and go and are commonly very short-lived. In this regard, we consider that the type of vertigo with which the appellant suffers is, unlike other vertigo inducing conditions like Meniere's Disease, not one which would have rendered her unable to function for prolonged periods of time."

and at paragraph 8:

"The entry in the appellant's GP notes and records dated 10 October 2022 reinforces to us that, for the majority of the period in which the appellant's vertigo resurfaced, it was not so severe as to warrant an award of points. On that date, although the appellant reported that her vertigo is still bad, she asks her GP for advice on whether she can drive. This suggests to us that she was contemplating driving at that time. We don't think this is consistent with the suggestion made that she was debilitated by her vertigo. We acknowledge that the appellant's GP did refer her to the stroke team on 26 September 2022 for an MRI. We are, however, of the view this was precautionary step by her GP given the appellant's continued symptoms but cannot be relied upon as an indication of their severity."

at paragraph 23:

"We are conscious that the appellant was not working by the date the Department made its decision following the reoccurrence of her vertigo. However, for the reasons outlined above, we are not convinced that the appellant's ability to mobilise was significantly hampered by her vertigo at that time: given the nature of the condition with which she was diagnosed we are not convinced that it would have prevented her from mobilising for any substantial period or that precluded her from doing so safely; although there is mention in the entry of 15 September 2022 of her banging into things, there is nothing in her GP notes and records to suggest that she had fallen or injured herself because of her vertigo while mobilising."

25. While noting that the tribunal included a doctor, who was assisted by the appellant's medical records, he accepted that it was in a position to contextualise any report made by her GP. However, he submitted that in making general comments on the nature of the vertigo with which the appellant was diagnosed, the tribunal had applied an incorrect test. He submitted that the tribunal had not applied the "broad brush" approach to the appellant's vertigo required by the case law cited above. On this basis he submitted that the tribunal had erred in law, and he supported the appellant's appeal.

26. It seems to me that there is some force in Mr Finnerty's argument in support of the appellant. It seems clear that the episodes of vertigo were not entirely minimal. There was a variability in the appellant's condition. While it may be that the tribunal has felt that the episodes of vertigo were nevertheless insufficiently regular to require consideration on a broad approach, it has not expressly stated this. It is not possible for me to say with certainty that adopting a broad approach in compliance with the case law authorities would have led to a different conclusion. Nevertheless, accepting that the authorities cited by Mr Finnerty are more than simply best practice – they give rise to a legal requirement – I conclude that the tribunal has erred in law in its approach as Mr Finnerty submits.
27. I allow the appeal and I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

(Signed): O STOCKMAN

COMMISSIONER

3 September 2024