

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**EMPLOYMENT AND SUPPORT ALLOWANCE**

Appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 7 September 2017

**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 Ballymena.
2. I granted leave to appeal on 20 August 2018. For the reasons I give below, I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I refer the appeal to a newly constituted tribunal for determination.

**REASONS**

**Background**

3. The applicant claimed employment and support allowance (ESA) from the Department for Social Development (the Department) from 30 June 2014 by reason of irritable bowel syndrome (IBS), anxiety, depression and post-traumatic stress disorder (PTSD). On 22 July 2015 an appeal tribunal had decided that the applicant had limited capability for work. On 3 February 2016 the applicant was sent a questionnaire by the Department regarding her ability to perform various activities, but she did not return it. The Department obtained an ESA113 report from the applicant's general practitioner (GP). On 8 April 2016 a health care professional (HCP) examined the applicant on behalf of the Department. On 14 April 2016 the Department considered all the evidence and determined that the applicant did not have limited capability for work (LCWA) from and including that date, and made a decision superseding and disallowing the applicant's award of ESA. She appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 7 September 2017. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 10 January 2018. 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 21 March 2018. On 19 April 2018 the applicant applied for leave to appeal from a Social Security Commissioner.

### **Grounds**

5. The applicant has set out her grounds in a manner which takes issue with twenty-one of the twenty-six numbered paragraphs in the tribunal's statement of reasons. In summary, the applicant submits that the tribunal has erred in law on the basis that:
  - (i) she had never received an ESA50 questionnaire;
  - (ii) its decision was not based on an accurate understanding of her health problems;
  - (iii) it placed too much weight on her ability to work part-time;
  - (iv) it had reached the wrong conclusions in relation to the ESA activities.
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 expressed some support for the applicant's case in relation to the issue of ability to get to unfamiliar places. However, he observed that this would not have a material effect on the outcome of the appeal. He consented to the Commissioner treating the application as an appeal and determining any question on the application as if it arose on appeal.

### **The tribunal's decision**

7. On the applicant's application, the LQM 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 previous appeal papers, an ESA113 form completed by the applicant's GP and the ESA85 HCP report. The applicant attended the appeal and gave oral evidence. The Department was represented by a presenting officer. The tribunal identified the issues in dispute as activities 9, 10, 13, 15, 16 and 17.
8. The tribunal did not accept the credibility of the applicant's evidence regarding activity 9 (continence) and activity 10 (consciousness). In assessing mental disablement, the tribunal noted that the applicant lived

alone, could attend to personal care independently, took her own medication, organised her own appointments and cooked for herself, and that at the date of decision she was working 15 hours per week in a supermarket. It found that she did not satisfy any descriptor within activity 13 (Initiating and completing personal action). It found that she was able to go to familiar places alone and found no credible reason why she would need to be accompanied in unfamiliar places, awarding no points for activity 15 (Getting about). In relation to activity 16 (Coping with social engagement), it found that her job involved interaction with customers and was able to interact at the medical appointment with the HCP, awarding no points in consequence. For the purpose of activity 17 (Appropriateness of behaviour), it found that she was able to control her actions and emotions and found no credible evidence of disinhibited behaviour, awarding no points.

9. As it awarded no points for any of the disputed activities, the tribunal disallowed the appeal.

### **Relevant legislation**

10. 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**

11. 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.
12. 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.
13. 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.

14. The tribunal had set its reasons down in 26 numbered paragraphs. In her application for leave to appeal, the applicant has set out her grounds in a format of challenging the tribunal's reasons in all but paragraphs 5, 18, 20, 21 and 26 - under correspondingly numbered headings running to some 20 pages.
15. In its statement of reasons at paragraph 1, the tribunal set out the point that it cannot take account of any improvement or deterioration in the applicant's conditions after the date of the decision. This is a routine statement of the restrictions imposed on a tribunal by Article 13(8)(b) of the Social Security (Northern Ireland) Order 1998 (the 1998 Order). The applicant submits that her health has deteriorated since being refused the [ESA] claim. No arguable error of law is evident from this.
16. In its statement of reasons at paragraph 2, the tribunal indicates that its role is not to diagnose conditions, but to consider how those conditions may affect the applicant and assess function. The applicant submits that the duration of the tribunal – at 25 minutes – was too short for her to be assessed credibly. It appears to me that the tribunal adduced sufficient evidence in relation to the six activities in dispute in that time to determine the hearing. I observe that at the conclusion of the hearing the applicant said, presumably in response to an invitation to make any further submissions, "No that's everything". I do not accept that it is arguable that the tribunal erred in law on this basis.
17. In its statement of reasons at paragraph 3, the tribunal began its consideration of Activity 9 (Continence), noting that the applicant experienced symptoms of constipation and diarrhoea, but was under management by her GP and not a specialist, having had a normal colonoscopy in 2014. The applicant submitted that this was not accurate, making submissions which dispute this. However, there is an entry from the applicant's GP on the ESA113 form stating "normal colonoscopy 30/9/14". The tribunal was entitled to make this statement therefore and no arguable error of law arises on this ground.
18. In its statement of reasons at paragraph 4, the tribunal sets out the applicant's evidence concerning bowel symptoms and reported her statement that new medication from 2016 had helped to an extent. The applicant makes further submissions of fact under this heading and does not identify any arguable error of law.
19. In its statement of reasons at paragraph 6, the tribunal reiterated that, whereas her change in medication in 2016 may have led to an improvement in health, it is limited by Article 13(8)(b) of the 1998 Order to considering circumstances at the date of the decision under appeal (April 2016). In response, the applicant submits that her physical condition had an impact on her mental health. This is a submission of fact which does not identify any arguable error of law.

20. In its statement of reasons at paragraph 7, the tribunal indicates that it did not find the applicant's evidence to be credible. She takes issue with this, making a number of factual assertions. However, these do not give rise to an arguable case of error of law.
21. In its statement of reasons at paragraph 8, the tribunal records a number of statements about the applicant's employment in a supermarket, including her report of a change in her role from check-outs to self-scanning. It indicates that there was no evidence before it of sick absences or disciplinary proceedings due to illness. The applicant again makes factual assertions, and encloses documents which establish some difficulties with work attendance. However, all the documents post-date the period under consideration by the tribunal, and I am not satisfied that an arguable error of law is established.
22. In its statement of reasons at paragraph 9, the tribunal notes that the applicant did not bring a change of clothing with her to the medical examination. The applicant asserts in this regard that she forgets things. However, it is clearly a factor that the tribunal was entitled to take into consideration.
23. In its statement of reasons at paragraph 10, the tribunal stated its conclusions on the activity of Continence. The applicant raises the issue of credibility and asserts that the provision of medical reports is outside her control. No arguable error of law is raised in this ground.
24. In its statement of reasons at paragraph 11, the tribunal addresses Activity 10 (Consciousness). It rejected the credibility of the applicant's account of loss of consciousness on the toilet, noting the lack of investigations for blackouts. The applicant asserts that she has recently been referred to a neurologist. However, on the evidence before it, the tribunal has reached a conclusion that it was entitled to reach. I do not consider that the applicant establishes an arguable error of law on this ground.
25. In its statement of reasons at paragraph 12, the tribunal addressed and stated conclusions on Activity 13 (Initiating and completing personal action), setting out some of the evidence regarding her daily activities. The applicant challenges the tribunal's findings of fact, indicating that she struggles to perform the activities and has recently cut down her working week to 12 hours. I consider that she does not identify any arguable error of law on the basis of her submissions.
26. In its statement of reasons at paragraph 13, the tribunal begins to address Activity 16 (Getting about), noting her ability to get to some familiar places. The applicant makes factual assertions regarding this. No arguable error of law is identifiable from these.

27. In its statement of reasons at paragraph 14, the tribunal addresses ability to get to unfamiliar places, indicating that the applicant's mental health is stable. The applicant disputes this finding.
28. Mr Collins for the Department gives the applicant some support on this ground. He submits that in regard to the applicant's ability to get to unfamiliar places, he can find nothing to indicate the issue was explored to any degree, saying that the tribunal appears to have reached its conclusion based on the applicant's "stable" mental state without any exploration with the applicant in relation to this issue. He agrees that the tribunal erred in its consideration of the relevant Activity, while noting that the 6 points which might have been awarded under this heading would be insufficient to materially affect the outcome of the appeal. I grant leave to appeal on this ground.
29. In its statement of reasons at paragraph 15, the tribunal addresses Activity 16 (Coping with social engagement). It notes her customer facing role at work, her engagement with the HCP and the fact that she has a boyfriend. It observes that a medical is not social engagement yet reasons that the applicant's ability to attend the medical indicates an ability to interact with people who are unfamiliar to her.
30. The applicant questions the findings of the tribunal in the context of work, pointing out that she just fixes problems with a self-service machine and doesn't converse with customers, doesn't have a boyfriend and submits that her attendance at a medical, under threat of losing benefit, does not show ability to interact with people.
31. In *NL-v-Department for Social Development* [2015] NI Com 28, I endorsed the approach of a three-judge panel of the Upper Tribunal in *JC v Secretary of State for Work and Pensions* [2014] UKUT. The Great Britain decision addressed the issue of what constituted social contact for the purposes of Activity 16, Schedule 2 to the ESA Regulations 2008. That three-judge panel indicated a need for evidence of the "necessary degree of reciprocity, give and take, initiation and response".
32. It appears to me that the tribunal has concluded that interaction with customers in the supermarket and with the HCP would demonstrate sufficient social interaction to the extent that Activity 16 would not be satisfied. However, I am not satisfied that such examples do demonstrate the necessary degree of reciprocity, give and take, initiation and response with persons unfamiliar to the applicant. I consider that there is some merit in this ground and I grant leave on this ground also.
33. In its statement of reasons at paragraph 16, the tribunal addressed Activity 17 (Appropriateness of behaviour). It refers to the applicant's evidence about techniques to control her temper and her statement that she can "explode". In her submissions, the applicant refers to irritability and appears to take issue with the tribunal's findings. However, I see no arguable ground of error of law arising.

34. In its statement of reasons at paragraph 17, the tribunal again refers to the applicant's statement that she can "explode". She submits that when she refers to "explode" she does not mean that she would "go completely overboard". However her reaction may be described, I do not consider that the applicant establishes an arguable error of law under this heading.
35. In its statement of reasons at paragraph 19, the tribunal addresses regulation 19 of the ESA Regulations. In this context it reiterates its finding that she had used public transport to familiar or unfamiliar places. The applicant submits that she gets a lift to work and is accompanied to work. Again, these are submissions of fact. It is not my role to reconsider the evidence. No ground of error of law is identified here.
36. In its statement of reasons at paragraph 22 the tribunal found that there was no substantial risk to the applicant's physical or mental health or that of anyone else if she were found not to have limited capability for work. It further addressed terminal illness at paragraph 23. It noted some case law that had been considered at paragraph 24 and stated its conclusions at paragraph 25.
37. In her grounds, the applicant submits that the reasons at 22-25 do not give an accurate picture of her. She reiterates factual assertions on social engagement and aggressive behaviour, and makes general factual submissions about her circumstances.

### **Conclusions**

38. Mr Collins submits that an arguable error of law is evident from the tribunal's treatment of the activity of "Getting around" and I accept that submission. However, he submits that this would lead to an award of 6 points at best and should not materially affect the outcome of the appeal. I see the force in this submission.
39. However, I further consider that there is an error of law evident from the tribunal's treatment of the activity of "Coping with social engagement". The evidence obtained by the tribunal does not appear to me sufficient to determine whether the applicant's engagement with someone unfamiliar has the necessary degree of reciprocity, give and take, initiation and response. The examples of interaction with unfamiliar persons were drawn from work and attendance at the HCP examination.
40. It seems to me that the level of interaction with customers in the self-service area of a supermarket is likely to be limited to instances of resetting a machine being used by a customer. The context is often a response to a machine's alert, rather than interaction with the customer, and involves addressing the machine fault rather than the customer.

41. It also appears to me that any social engagement at a medical examination, where the consequence of non-attendance is being treated as not having limited capability for work (under regulation 23 of the ESA Regulations), is artificial. It appears to me that it lacks the true characteristics of social interaction indicated in *JC v SSWP*. The tribunal acknowledged that “we of course accept that attendance at a medical is not social engagement”, while finding that “her ability to do so indicates an ability to interact with people who are unfamiliar to her”. I disagree with that logic. If the situation of attendance at a medical is not social engagement, it is not justifiable to draw an inference from it about an ability to cope with actual social engagement.
42. The descriptors addressing contact with unfamiliar persons could lead to an award of up to 9 points. This does make it theoretically possible that the relevant threshold could be reached by the applicant. I therefore consider that I should allow the appeal, set aside the decision of the appeal tribunal and refer the appeal to a newly constituted tribunal for determination.
43. I would caution the applicant that this outcome should not give rise to any undue expectation of success at the new tribunal, who will hear evidence on the relevant activities and determine all the issues afresh.

(signed): O Stockman

Commissioner

25 October 2018