

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 7 September 2017

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 Dungannon.
2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

3. The appellant claimed employment and support allowance (ESA) from the Department for Social Development, now the Department for Communities, (the Department) from 4 June 2015 by reason of anxiety, depression, a musculoskeletal problem, a cardiovascular problem, incontinence, migraine and blackouts. On 22 December 2016 the appellant completed and returned a questionnaire to the Department regarding her ability to perform various activities. On 18 January 2017 a health care professional (HCP) examined the appellant on behalf of the Department. On 2 March 2017 the Department considered all the evidence and determined that the appellant did not have limited capability for work from and including 2 March 2017, and made a decision superseding and disallowing the appellant's award of ESA. The appellant requested reconsideration, and the decision was reconsidered but not revised in a decision issued on 28 March 2017. The appellant 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 appellant then requested a statement of reasons for the tribunal's decision and this was issued on 24 October 2017. 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 November 2017. On 15 December 2017 the appellant applied for leave to appeal from a Social Security Commissioner.

Grounds

5. The appellant, represented by Mr Casey of Citizens Advice Mid-Ulster, submits that the tribunal has erred in law on the basis that it had given insufficient reasons for its decision under regulation 29 and regulation 35 of the ESA Regulations.
6. The Department was invited to make observations on the appellant's grounds. Mr Vernon of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support 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 evidence before it consisting of the Department's submission, which included a copy of the ESA50 self-assessment questionnaire and the ESA85 HCP report, a copy of a previous decision, a list of the appellant's medication and a pro forma questionnaire completed by the appellant's General Practitioner (GP). The appellant attended the hearing and gave oral evidence, accompanied by her daughter and represented by Mr Casey. The Department was represented by Mr O'Neill. The appellant's representative asked the tribunal to focus on activity 1 (Mobilising), activity 2 (Standing and sitting), and activity 4 (Picking up and moving), and on activity 12 (Awareness of hazards), activity 13 (Initiating and completing personal action), activity 15 (Getting about) and activity 16 (Coping with social engagement).
8. While observing and accepting that the appellant had a significant number of medical conditions, which give the appellant some difficulties, the tribunal considered that the appellant exaggerated her evidence and did not find her to be entirely credible. For example, it was not convinced by her statement that she did not attend the pain clinic because she was in too much pain. It found that she would not have relevant difficulties with the physical activities and awarded no points. The tribunal noted that the appellant was on a low dose of antidepressant, and had no specialist psychiatric referral. It was not convinced by the appellant's evidence about her lack of activity during the day. It accepted that she

would have some relevant difficulty getting out and about to unfamiliar places, awarding 6 points. It found that she would have problems with social engagement with unfamiliar people, awarding 6 points. It found that she did not satisfy any exceptional circumstances under regulation 29 or 35 of the ESA Regulations and 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.

10. By regulation 29, if a claimant is not found to have limited capability for work he or she may nevertheless be treated as having limited capability for work on the basis of exceptional circumstances. It provides:

29.—(1) A claimant who does not have limited capability for work as determined in accordance with the limited capability for work assessment is to be treated as having limited capability for work if paragraph (2) applies to the claimant.

(2) Subject to paragraph (3) this paragraph applies if—

(a) the claimant is suffering from a life threatening disease in relation to which—

(i) there is medical evidence that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure; and

(ii) in the case of a disease that is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure; or

(b) the claimant suffers from some specific disease or bodily or mental disablement and, by reasons 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.

....

11. A similar provision appears at regulation 35 in the context of work related activity. However, I do not consider it necessary to set out that provision, as regulation 35(2) is virtually identical to regulation 29(2), differing only in that the context is work related activity, and the principles applying are the same.

Submissions

12. Mr Casey made cogent arguments on behalf of the appellant. His core submission was that the tribunal had erred in law by not giving reasons for that part of its decision dealing with regulation 29 and regulation 35 of the ESA Regulations (which I will subsequently refer to as the exceptional circumstances provisions). The tribunal stated: “We did not find that there would be a substantial risk to the mental or physical health of any person if the Appellant were found capable of work or work related activity”. Mr Casey submitted that the tribunal should have given reasons why the exceptional circumstances provisions did not, in its opinion, apply.
13. Mr Casey relied upon the decision of the Court of Appeal of England and Wales in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42. While not technically binding here, I have expressly followed that decision in Northern Ireland in *AH -v- Department for Communities* [2017] NI Com 13. On the facts of the particular case, I had decided that the tribunal had not done enough to meet the obligations which arise from *Charlton*, namely to identify the range of workplaces the particular appellant might find himself in and to assess the risks in that context.
14. For the Department, Mr Vernon acknowledged the jurisprudence cited. He further observed that in *HA-v-Department for Social Development (ESA)* [2011] NI Com 213, Chief Commissioner Mullan had endorsed my view of *Charlton*. Nevertheless, he submitted that the present case could be distinguished on its facts. He submitted that, unlike the case in *HA v DSD*, the issue of exceptional circumstances had not been raised before the tribunal.
15. In response, Mr Casey submitted that the tribunal’s inquisitorial role required it to examine this issue, citing Kerr LCJ (as he then was) in *Mongan v Department for Social Development* [2005] NICA 16. He submitted that the words “raised by the appeal” in Article 13(8)(a) of the Social Security (NI) Order 1998 did not limit a tribunal’s consideration to issues articulated by the appellant or the appellant’s legal representatives.
16. Mr Casey secondly submitted that the tribunal was required to do more than give a bare statement that the exceptional circumstances provisions did not apply. Relying on the reported Upper Tribunal decision of Deputy Judge White in *NS v Secretary of State for Work and Pensions* [2014]

AACR 33, he set out paragraphs 41-57, which consider the implications of the various authorities on this issue. I set these paragraphs out below:

41. What is the effect of all these authorities? It seems to me that they are all saying that whether regulation 29(2)(b) requires to be considered depends on all the circumstances of the case. In so far as CSE/223/2013 and CSE/27/2013 may be saying otherwise, I disagree with them.
42. The Secretary of State's submissions to tribunals frequently makes passing reference to regulation 29, though seldom addresses it in any detail. If there has been a medical examination and report, that always refers to the applicability of exceptional circumstances, though, as Judge Gray pointed out in *SP v Secretary of State for Work and Pensions*, that takes the form of a restatement of the statutory test. It is an assertion since there are no supporting reasons. Very occasionally there are some supporting reasons in the healthcare professional's report. They may be enough to bring consideration of regulation 29(2)(b) into play.
43. Sometimes the terms of the decision under appeal, or the reconsideration of it, assert that regulation 29(2)(b) does not apply.
44. This is, of course, not entirely satisfactory. It places an additional burden on tribunals to decide when regulation 29(2)(b) is in issue and when they need to provide reasons for its not applying to a particular claimant.
45. It must also be remembered that regulation 29(2)(b) is not just about whether there is any work or type of work which a claimant can do without substantial risk to the mental or physical health of any person. It is about whether a substantial risk would arise from a claimant's being found not to have limited capability for work. In *IJ v Secretary of State for Work and Pensions (ESA)* [2010] UKUT 408 (AAC) Judge Mark observed:

10. Further, the test is not limited to whether there would be a substantial risk to the claimant from any work he may undertake. The test is as to the risk as a result of being found capable of work. If he was found capable of work, he would lose his incapacity benefit, and would very possibly need to seek work and apply for jobseeker's allowance. That would involve his attending interviews, and going through all the other steps that would be needed to obtain and keep jobseeker's allowance. In the present economic climate, a claimant who is 62 years old with mental health problems, and who has not worked since the early 1990's, is unlikely to find work quickly and would very possibly never find it. His GP's assessment that it is inconceivable that he would ever be able to earn his living may be right. The tribunal would then have to determine how this

change from his being in receipt of incapacity benefit would affect the claimant's mental health, looking not at some work he may do, but at the effect on his mental health of fruitless and repeated interviews and the possibly hopeless pursuit of jobs until he reached retirement age. These factors were not considered by the tribunal, and indeed they did not elicit the information necessary to enable them to be considered, such as whether he had in fact applied for jobseeker's allowance and if not, how he was coping or would cope.

46. It will seldom be the case that the documents before a tribunal provide much detail about a claimant's educational and training background, which may well be relevant to issues raised by a full consideration of regulation 29(2)(b).
47. There will be some cases in which a tribunal need say nothing about regulation 29(2)(b). I give one clear example. Where a claimant is represented, claims only problems with physical functions, is found to score no points under Part 1 of Schedule 2 to the Employment and Support Allowance Regulations 2008, and where the representative does not put regulation 29(2)(b) in issue, a tribunal can safely leave out any mention of regulation 29(2)(b). However, in such a case a wise tribunal would seek confirmation from the representative that no issue is raised under regulation 29(2)(b) if they were to find that no points are scored under the Part 1 descriptors.
48. There will be some cases in which a tribunal must address regulation 29(2)(b). Clearly, if it is put in issue by a claimant, it must be fully and properly addressed. This will not require repetition of the findings of fact made in respect of the descriptors in Schedule 2, but that will be the obvious starting point for the explanation of why regulation 29(2)(b) does or does not apply.
49. In cases in which the descriptors relating to mental, cognitive and intellectual functions are in issue, it is more likely that regulation 29(2)(b) will be relevant. After all, in cases which come before the tribunal, more often than not the claimant's GP has issued a certificate that the claimant is incapable of work (though I accept that the GP may not be making that judgment against the Schedule 2 assessment). If the GP has submitted a letter in support of the claimant's appeal, that will often indicate why the GP considers that the claimant is incapable of work.
50. I would agree with the observation of Judge Ward in *RB v Secretary of State for Work and Pensions (ESA)*, which I have quoted in paragraph 35 above, that the more narrowly focused the descriptors become, the more likely it is that the safety net provision of regulation 29(2)(b) will be in issue.

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.
54. However, that is rather to jump the gun. Was this a case in which the tribunal was required to consider regulation 29(2)(b) and to give reasons at the level I recommend in order to avoid erring in law?
55. The appellant was 54 at the date of the decision on the conversion process from entitlement to incapacity credits to entitlement to an employment and support allowance. She was unrepresented. She was suffering from progressive arthritis and what her GP describes as “acute depression”, as well as some other ailments. There was evidence of ongoing hospital investigations in relation to her arthritis at or around the time of the decision under appeal, and suggestions that it was getting worse.
56. The appellant’s own assessment of the effects of her conditions is markedly at odds with the conclusions the tribunal reached. The tribunal concluded that the decision maker had wrongly assigned points on the mobilising descriptor. Furthermore regulation 29 is addressed in the Secretary of State’s submission to the tribunal (see para.5.5 of that submission).
57. In my view, this was not a case in which a bare statement that regulation 29(2)(b) did not apply without any reasons for that conclusion was adequate. The tribunal, which had disagreed fundamentally with the appellant about the effects of her condition on her, needed to give reasons for its conclusion on the application of regulation 29(2)(b). It did not do so. In failing to do so, it erred in law. I set their decision aside for this reason. I remit the appeal for

determination at an oral hearing before a differently constituted tribunal.

17. I considered that Mr Casey had made out an arguable case on behalf of the appellant on this basis and I granted leave to appeal.
18. An oral hearing had not been requested and I decided that it was not necessary to hold an oral hearing. However, in order to ensure that the proceedings were procedurally fair, I directed Mr Casey to make further submissions addressed to the question of whether it was clearly apparent from the evidence before the tribunal that regulation 29 or regulation 35 of the ESA Regulations arose in the particular case. Further submissions were received from Ms Holland of Mid Ulster Citizens Advice in response.

Assessment

19. Before dealing with the particular facts of the case, it is necessary to address a decision of Deputy Commissioner Mitchell that was relied upon in Ms Holland's submissions, namely *JS v Department for Communities* [2017] NI Com 17. At paragraph 18, the Deputy Commissioner said:

“The evidence showed that the appellant had not worked for some 15 years or so and his GP report stated that, despite an unchallenging lifestyle, he suffered from panic attacks and generally had difficulty coping . In those circumstances, the tribunal was required to grapple with the potential health-related consequences for the appellant should he return to the workplace (*Charlton v Secretary of State* [2009] EWCA Civ 42). The tribunal should have explained why a return to the workplace was unlikely to cause a deterioration in the appellant's mental health such as to amount to a substantial risk to his mental health”.

20. It appears to me that among the principles to be drawn from *NS v SSWP* is that the question of whether the exceptional circumstances provisions require to be considered depends on all the circumstances of the case. Where an appellant puts the exceptional circumstances provisions in issue, clearly they must be addressed. However, there may be cases where a tribunal may safely leave out any mention of the exceptional circumstances provisions altogether – such as the case identified by Deputy Judge White, where the representative indicates that the exceptional circumstances provisions were not in issue and the appellant has relied solely on physical functions which do not give rise to obvious issues of risk. Nevertheless, as indicated by Chief Commissioner Mullan in *HA-v-Department for Social Development (ESA)* [2011] NICom 213:
25. In the majority of cases in which an appeal tribunal is considering whether the appellant has limited capability for work in accordance

with the work capability assessment, the further issues of whether he also satisfies the exceptional circumstances in regulation 29, will not be relevant. Nonetheless, it will be safest and best practice for appeal tribunals to note that the regulation was considered. Where a statement of reasons for the appeal tribunal's decision is requested it will also be safest and best practice to make a reference therein that the application of regulation 29 was considered but was discounted. That will not be an onerous duty for appeal tribunals. Where regulation 29 is not relevant a simple statement to that effect is sufficient.

21. Here, the exceptional circumstances provisions were not put in issue before the tribunal. Nonetheless, I consider that Mr Casey is entitled to rely on the principles established by the Court of Appeal in *Mongan v DSD* in such circumstances.
22. Mr Casey refers to the fact that the appellant is a 57 year old woman with no qualifications, who last work as a waitress, but had to give that up due to health reasons. He refers to evidence of the appellant's physical and mental health difficulties. Mr Casey submits that the tribunal, which diverged in its assessment of the appellant's difficulties from her own assessment, should have stated reasons for not accepting that the exceptional circumstances provisions applied.
23. As indicated by Chief Commissioner Mullan, giving reasons is safest and best practice. I do not disagree with that. Where reasons are not given, it appears to me that the question of whether a tribunal has erred in law for failing to give reasons must be contingent on the question of whether the exceptional circumstances provisions have been raised or, from the evidence, clearly arise. This can only be determined on a case by case basis. As observed by Chief Commissioner Mullan, the exceptional circumstances provisions will not be relevant to the majority of cases. Here Mr Casey says that they were relevant, while the Department submits that they were not.
24. It is not disputed that the exceptional circumstances provisions were not raised with the tribunal as an issue. The fact that a representative does not raise an issue is not something which relieves the tribunal of its inquisitorial obligation (see *Mongan v DSD* at paragraph 18). The question is whether the circumstances were such that the tribunal should have applied its inquisitorial jurisdiction to address those provisions and, as a necessary corollary of that, to have given fuller reasons for its decision. It appears to me that whether the issue of exceptional circumstances arose, and whether the tribunal should have addressed it, depends on the question of whether it was clearly apparent from the evidence that it arose in the particular case. As indicated, I sought further submissions from the appellant on that issue.
25. In the submissions advanced by Ms Holland, reliance is placed on Deputy Commissioner Mitchell's treatment of the issue in *JS v DfC*.

However, it appears to me that Deputy Commissioner Mitchell considered that the applicability of the exceptional circumstances provisions was clearly apparent from the evidence in the particular case before him.

26. Ms Holland recites the appellant's medical conditions. However, it appears to me, there is nothing inherent in those conditions to make it clearly apparent that the exceptional circumstances provisions applied in the present case. That should be enough to decide the appeal.
27. If I am wrong about that, then the implication is that the tribunal should have given reasons for the bare statement that "We did not find that there would be a substantial risk to the mental or physical health of any person if the Appellant were found capable of work or work related activity". Upper Tribunal Judge White in *NS v SSWP*, at paragraph 53 had said of a similar statement by a tribunal, "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".
28. However, it seems to me that Judge White was not speaking literally, but with something of a flourish in his words. I consider that it is necessary to read the tribunal's reasons as a whole. I do not consider that the explanation needs necessarily to come immediately after the tribunal's statement that regulation 29(2)(b) does not apply. In the present case, the sentence immediately preceding this statement gave sufficient explanation. The tribunal said in that sentence that "we did not find the Appellant to be a credible witness and we believe that she has greatly exaggerated her difficulties".
29. It appears to me that the tribunal's decision that the exceptional circumstances provisions did not apply in the present case is adequately explained by that statement. It is obvious that it was not persuaded that the appellant's health was such as to satisfy the relevant criteria. It follows that I do not accept that the tribunal has erred in law for failing to give adequate reasons for its decision under regulation 29 and 35.

I disallow the appeal.

(signed): O Stockman

Commissioner

4 April 2019