CB-v-Department for Communities (II) [2020] NICom 11

Decision No: C1/19-20(II)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INDUSTRIAL INJURIES

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 15 January 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from a decision of an appeal tribunal sitting at Omagh.

2. For the reasons I give below, I grant leave to appeal. However, I consider that I must disallow the appeal.

Background

3. The appellant claimed industrial injuries disablement benefit (II) from the Department for Communities (the Department), on 2 March 2015. The claim was in respect of an industrial accident that occurred on 30 January 2015. The appellant, a prison officer, swallowed stagnant water that was discharged by a sprinkler system set off by a prisoner. Some 10 days later he developed a chest infection, which was treated with antibiotics. After three weeks he was admitted to hospital with pneumonia, suffering a partially collapsed lung and a swollen kidney. In August 2015 he was diagnosed as suffering from Wegener's Granulomatosis. He was medically examined by a medical officer of the Department on 3 September 2015, who was of the opinion that the industrial accident had not resulted in a loss of faculty. On 15 September 2015 the Department decided that the appellant was not entitled to II because there was no loss of faculty after the expiry of 90 days (excluding Sundays) beginning with the date of the industrial accident. The appellant appealed.

4. The appeal was considered by an appeal tribunal consisting of a legally qualified member (LQM) and two medically qualified members. After a hearing on 15 January 2018, the tribunal disallowed the appeal. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 30 April 2018. The appellant applied to the LQM for leave to appeal from the tribunal's decision but leave to appeal was refused by a determination issued on 22 June 2018. On 19 July 2018 the appellant sought leave to appeal from a Social Security Commissioner.

Grounds

5. The appellant submits that the tribunal has erred in law on the basis that he had suffered illness as a result of the accident and that the time limit of 90 days was not fair, just and appropriate in his case.

6. The Department was invited to make observations in response to the application. Mr Hinton 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 opposed 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 which consisted of the Department's submission and the medical evidence scheduled to it. It further had access to the appellant's general practitioner (GP) records. The appellant attended and gave oral evidence. The appellant's named representative did not attend.

8. The tribunal accepted that the appellant had experienced an industrial accident on 30 January 2015, when working in HMP Maghaberry, whereby water was discharged from a sprinkler system and hit him in the face, causing him to ingest and inhale some of this water. The tribunal accepted the appellant's description of the water as putrid and stinking. The tribunal accepted that, some 10 days later, the appellant felt unwell and visited his GP, where he was found to have a temperature and a chest infection was treated by antibiotics. The tribunal accepted that, some three weeks after the accident, the appellant attended Craigavon Hospital where he was found to have pneumonia, a partially collapsed lung and a swollen kidney. The tribunal accepted that, some two weeks following his discharge from hospital, the appellant attended A&E and was treated for suspected Legionnaire's disease. The tribunal accepted that in the following August he was diagnosed with Wegener's Granulomatosis, being treated with a high dose or steroids and infusions.

9. The issue before the tribunal, in essence, was whether there was any connection between the incident of 30 January 2015 and the onset of Wegener's disease. The tribunal decided that there was no evidence of

a link between the water from the sprinkler system and the subsequent development of with Wegener's Granulomatosis. It disallowed the appeal.

Legislation

10. The legislation governing the present case is to be found in the Social Security Contributions and Benefits Act (NI) 1992. Industrial injuries benefits are established by section 94. This provides:

94.—(1) Industrial injuries benefit shall be payable where an employed earner suffers personal injury caused by accident arising out of and in the course of his employment, being employed earner's employment.

(2) Industrial injuries benefit consists of the following benefits—

(a) disablement benefit payable in accordance with sections 103 to 105 below, paragraphs 2 and 3 of Schedule 7 to this Act and Parts II and III of that Schedule;

…

11. As indicated above, II is established by section 103 of the Act. This provides:

103—(1) Subject to the provisions of this section, an employed earner shall be entitled to disablement pension if he suffers as the result of the relevant accident from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 14 per cent, or, on a claim made before 19th November 1986, 20 per cent.

(2) ...

(5) In this Part of this Act "assessed", in relation to the extent of any disablement, means assessed in accordance with Schedule 6 to this Act; and for the purposes of that Schedule there shall be taken to be no relevant loss of faculty when the extent of the resulting disablement, if so assessed, would not amount to 1 per cent.

(6) A person shall not be entitled to a disablement pension until after the expiry of the period of 90 days (disregarding Sundays) beginning with the day of the relevant accident.

…

12. Schedule 6 to the Act makes further provision as follows:

1. For the purposes of section 103 above and Part II of Schedule 7 to this Act, the extent of disablement shall be assessed, by reference to the

disabilities incurred by the claimant as a result of the relevant loss of faculty, in accordance with the following general principles—

> (a) except as provided in paragraphs (b) to (d) below, the disabilities to be taken into account shall be all disabilities so incurred (whether or not involving loss of earning power or additional expense) to which the claimant may be expected, having regard to his physical and mental condition at the date of the assessment, to be subject during the period taken into account by the assessment as compared with a person of the same age and sex whose physical and mental condition is normal;
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> (b) regulations may make provision as to the extent (if any) to which any disabilities are to be taken into account where they are disabilities which, though resulting from the relevant loss of faculty, also result, or without the relevant accident might have been expected to result, from a cause other than the relevant accident;
>
> (c) the assessment shall be made without reference to the particular circumstances of the claimant other than age, sex, and physical and mental condition;
>
> (d) the disabilities resulting from such loss of faculty as may be prescribed shall be taken as amounting to 100 per cent disablement and other disabilities shall be assessed accordingly.

Hearing

13. I held an oral hearing of the application for leave to appeal. The appellant attended and made submissions on his own behalf. Mr Kirk appeared on behalf of the Department. I am grateful to the appellant and to Mr Kirk for their help in deciding this case.

14. The appellant outlines the circumstances that led to the appeal in his case. He emphasised his good health until the date of the industrial accident, demonstrated by the fact that he had not previously missed a day at work due to sickness since 2006. He candidly discussed his health since the date of the incident. He explained that he had difficulty in obtaining supportive specialist evidence to link the incident of 30 January 2015 to the onset of Wegener's Granulomatosis. I agreed to give the applicant an opportunity to submit medical evidence in support of his case. He submitted a consultant's report shortly after the date of hearing.

15. Throughout the hearing Mr Kirk maintained that the tribunal had made a reasonable decision on the balance of probabilities.

Assessment

16. 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.

17. 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.

18. 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.

19. The appellant submitted that 90 day rule was unfair in his case. However, there is nothing about the particular rule that counts against him. It simply provides that injuries that result in a loss of faculty lasting fewer than 90 days fall outside the II scheme. As his condition relates to a period beyond the 90 days, no detriment arising from this rule would affect him. I do not accept that he establishes an arguable case on this ground.

20. The appellant principally makes the submission that the tribunal has erred in law by failing to find that the onset of Wegener's Granulomatosis in his case was linked to the discharge of water from the sprinkler system. In disallowing his appeal, the tribunal rejected that submission of fact. In order for the tribunal to be shown to have erred in law for rejecting the submission, it must be demonstrated that the evidence compelled the contrary conclusion. It is not enough to establish that a differently constituted tribunal might have come to a different conclusion.

21. The appellant submitted that the onset of the chronic condition of Wegener's Granulomatosis was triggered by the acute conditions resulting from his exposure to stagnant water in the sprinkler system. This requires him to show a causal link between the exposure to the water on 30 January 2015 and his subsequent acute illness in March 2015, and also between that acute illness and the subsequent onset of Wegener's Granulomatosis.

22. The height of the evidence in support of the appellant's case was a letter from a retired general practitioner who suffers from the same condition. The GP stated that:

> "it is my belief that it is highly probable that his initial acute, severe illness was attributable to the accidental exposure to the sprinkler system water at work. Given the ensuing medical history it is also highly probable that

> his GPA was triggered by this severe illness. Whether the GPA would have developed anyway we will never know. Indeed, it may never have shown itself. We all, in all likelihood, live with latent illness waiting for some trigger to make it rampant, a trigger that may or may not ever occur, fortune dictating this".

23. The appellant further placed emphasis on his hitherto excellent health record, which showed that he had not missed a day at work since 2006. Before the tribunal, he had relied on a leaflet concerning vasculitis, produced by Arthritis UK, which suggested that it might be triggered by an infection, although drugs and genetic factors were also indicated as possible causes.

24. The tribunal addressed the circumstances. It accepted the medical history outlined. It noted that the appellant when hospitalised was treated for Legionnaire's disease, but that the presence of Legionnaire's disease could not be established as the relevant urine test was not carried out. Some light can be shed on the thinking of the tribunal by the comments of one of the consultants on the tribunal panel in the record of proceedings. He observed that the cause of Wegener's Granulomatosis was unknown, but that one is more likely to get a chest infection if Wegener's is progressing. This suggests that the tribunal considered that it was as likely that the Granulomatosis was already present at the date of the chest infection as that the chest infection led to the Granulomatosis. In any event, the tribunal found that there was insufficient medical evidence available to support the link between the sprinkler system incident and the onset of Wegener's Granulomatosis.

25. After the date of the hearing before me, the appellant submitted a report by a consultant rheumatologist dated 19 December 2019. The report dealt with the likelihood of a connection between the ingestion of the sprinkler system water and the onset of Wegener's Granulomatosis. The report concluded:

> "In this case there is no clear causal link between the sprinkler exposure and the development of Wegener's Granulomatosis. However, there certainly remains a possibility that exposure to an atypical infection may have triggered the development of the condition".

26. The appellant has candidly submitted this report without further comment. I observe that it does not assist his case, in that it admits merely to the possibility that infection following exposure to the sprinkler system water may have triggered the condition.

27. The standard of proof to be applied by the tribunal is the civil standard of proof, namely whether it is more likely than not – i.e. probable - that there was a connection between the two events. The retired GP who suffers from the same condition had ventured the opinion that it was highly

probable that Wegener's Granulomatosis was triggered by the appellant's severe respiratory illness. However, that opinion was not given in the context of a doctor-patient relationship, but by a fellow-sufferer, and could be afforded less weight for that reason.

28. The tribunal included medical specialist members. As an expert tribunal, it was entitled to rely upon the experience and expertise of those members in determining the issues of fact before it. From the record of proceedings it appears that the panel rejected the retired GP's opinion and formed the view that it was equally likely that the chest infection was a symptom of Wegener's Granulomatosis than the cause of it. In a context where medical evidence generally cannot point to a definitive cause for the appellant's Wegener's Granulomatosis, this was not an unreasonable conclusion. It is also a conclusion that is mirrored by the report now submitted to me by the appellant, where the consultant rheumatologist who has seen him in a professional context can only indicate that a causative link was possible.

29. Possibility is not sufficient to reach the threshold set by the civil standard of proof. Probability is required. The tribunal did not accept that it was probable that the sprinkler system incident led to the onset of Wegener's Granulomatosis and I cannot accept that this conclusion was not reasonably open to the particular tribunal on the day.

30. The appellant has presented an arguable case and I grant leave to appeal. However, I consider that the tribunal has not erred in law and that I must disallow the appeal.

(signed): O Stockman

Commissioner

10 February 2020