

Decision No: C1/20-21(ESA)

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 8 November 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 8 November 2019 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
2. I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. An appeal tribunal which has a Medically Qualified Panel Member is best placed to assess medical evidence and address medical issues arising in an appeal. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.
4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his entitlement to Employment and Support Allowance (ESA) remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

Background

5. On 13 February 2018 a decision maker of the Department superseded an earlier decision of the Department decided that the appellant was not entitled to ESA from and including 13 February 2018. Following a request to that effect and the receipt of additional evidence the decision dated 13 February 2018 was reconsidered on 17 April 2018 but was not changed. An appeal against the decision dated 13 February 2018 was received in the Department on 29 May 2018.

6. Following an earlier adjournment, the substantive appeal tribunal hearing took place on 8 November 2018. The appellant was present and was represented. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 13 February 2018.

7. On 8 July 2019 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). On 22 July 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 27 August 2019 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 8 October 2019 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 29 October 2019, Mr Kirk, for DMS, opposed the application for leave to appeal on one of the grounds advanced by the appellant but supported the application for leave to appeal on the other and another identified ground. Written observations were shared with the appellant on 29 October 2019. On 1 November 2019 email correspondence was received from the appellant.

9. The case became part of my workload on 22 January 2020. On 21 April 2020 I granted leave to appeal. In granting leave to appeal, I gave, as a reason that it was arguable that the appeal tribunal has erred in law in failing to consider the potential application of regulation 29 of the Employment and Support Allowance Regulations (Northern Ireland) 2008, as amended. On the same date I determined that an oral hearing of the appeal would not be required.

Errors of law

10. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?

11. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly

encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

- “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
- (ii) failing to give reasons or any adequate reasons for findings on material matters;
- (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) giving weight to immaterial matters;
- (v) making a material misdirection of law on any material matter;
- (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

Analysis

12. In his written observations on the application for leave to appeal, Mr Kirk has made the following submissions:

‘In addition to the points raised by (the appellant) I would respectfully ask the Commissioner to consider the following issue. I note that the tribunal make the following comments at paragraph 1 of page 3 of the reasons for decision:

“...We do not deny that he had history of some depression and anxiety, some sequelae at one stage regarding the attack on him, nor indeed do we deny that he may have been diagnosed with Hydrocephalus-mild brain atrophy. It was the functional effect of the problems which we disputed ...”

In the above the tribunal have, in my opinion, accepted that (the appellant) did have some problems with depression, anxiety and mild brain atrophy. It is also true to note that in the rest of the reasons the tribunal clearly explain why it found that (the appellant) did not score any points and consequently he could not be found to have limited capability for work. When a tribunal finds that a claimant does not have limited capability for work it should move on to consider if the provisions of Regulation 29(2)(b) of the Employment and Support Allowance Regulations (Northern Ireland) 2008 apply unless the reasons as to why that legislative provision would not apply are obvious from its findings. Regulation 29(2) (b) states:

Exceptional circumstances

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) This paragraph applies if—

((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.

As the tribunal in this case had accepted that the claimant suffered from depression, anxiety and mild brain atrophy there was I submit an onus upon it to consider if the above regulation applied. I can find nothing in the reasons for decision to indicate that the tribunal ever considered this issue. For that reason I would submit that the tribunal has erred in law.’

13. I agree with Mr Kirk’s analysis and for the reasons which he has set out agree that the decision of the appeal tribunal is in error of law. In *HA-v-Department for Social Development (ESA)* ([2011] NICom 213, *C6/11-12(ESA)*), I said the following at paragraph 29:

‘... where the potential applicability of regulation 29 is clearly evident in the appeal, either because there has been a specific submission to that fact or, in the absence of a specific submission, the evidence which is before the appeal compels the appeal tribunal to consider the issues as part of its inquisitorial role, then an appeal tribunal will err in law in failing to deal with regulation 29 and/or demonstrating through the statement of reasons for its decision that it has dealt with it.’

Disposal

14. The decision of the appeal tribunal dated 8 November 2019 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

15. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:

- (i) the decision under appeal is a decision of the Department, dated 13 February 2018, which superseded an earlier decision of the Department and decided that the appellant was not entitled to ESA from and including 13 February 2018;

- (ii) the Department is directed to provide details of any subsequent claims to ESA and the outcome of any such claims to the appeal tribunal to which the appeal is being referred. The appeal tribunal is directed to take any evidence of subsequent claims to ESA into account in line with the principles set out in *C20/04-05(DLA)*;
- (iii) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and
- (iv) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed)

Kenneth Mullan
Chief Commissioner

16 June 2020