RGS-v-Department for Communities (II) [2021] NICom 25

Decision No: C1/21-22(II)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

INDUSTRIAL INJURIES DISABLEMENT BENEFIT

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 23 August 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from a decision of an appeal tribunal with reference OM/2109/19/67/M.

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

Background

3. The appellant claimed industrial injuries disablement benefit (II) from the Department for Communities (the Department), on 3 October 2016. The claim was in respect of an industrial accident that occurred on 22 August 2014. The appellant, a paramedic, was attending to a patient in the rear of an ambulance when the hand brake failed, causing the ambulance to run downhill and hit a wall and a house. The appellant was thrown against cupboards in the ambulance, injuring his back.

4. He was medically examined by a medical officer of the Department on 28 November 2016, who was of the opinion that the industrial accident had not resulted in a loss of faculty. On 5 December 2016, 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 on 22 August 2014. The appellant appealed, resulting in a favourable tribunal decision of 15 January 2018 and a provisional award of II from 6 July 2016 to 5 March 2019.

5. The appellant was examined again by a medical officer of the Department on 8 January 2019. On the basis of the report from that examination, the Department decided that the appellant was no longer entitled to II from 6 March 2019, as there was no longer any loss of faculty from the industrial accident. The appellant requested a reconsideration, and the decision was reconsidered but not revised. The appellant appealed.

6. The appeal was considered by an appeal tribunal consisting of a legally qualified member (LQM) and two medically qualified members. After a hearing on 23 August 2019, the tribunal decided that appellant had a net loss of faculty of less than 1% from 6 March 2019 for life – in effect disallowing the appeal. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 10 February 2020. 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 26 May 2020. On 5 June 2020 the appellant sought leave to appeal from a Social Security Commissioner.

Grounds

7. The appellant submits that the tribunal has erred in law on the basis that the tribunal wrongly disagreed with the previous tribunal's findings and on its interpretation of all the evidence.

8. The Department was invited to make observations in response to the application. Mr Arthurs 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

9. 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 including the Department's submission, containing the medical adviser's report of 28 November 2016, a consultant orthopaedic surgeon's medico-legal report and an update, the medical adviser's report of 8 January 2019 and various decision documents. It had the appellant's general practitioner records, and physiotherapy reports, and a letter dated 20 January 2015 from a consultant surgeon. The appellant attended the hearing and gave oral evidence.

10. The tribunal found that the appellant had a long history of spinal problems pre-existing the accident of 22 August 2014. The tribunal identified the issue before it as being whether the accident was the cause of any of the pain and discomfort that the appellant feels today. The tribunal was satisfied that the soft tissue injury suffered by the appellant on 22 August 2014 was not the cause of the vast majority of his symptoms by 17 January 2019, and amounted to less than 1% of such symptoms, there having been a gradual lessening of the effects of the accident over time.

Legislation

11. 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;

…

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.

…

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;

(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.

Submissions

12. The appellant submitted that the industrial accident considered by the tribunal caused him to lose his job due to incapacity, whereas prior to that he had been able to carry out the full range of duties of a paramedic, including up to 80 hours overtime per month. He submitted that prior to the accident he had been active in sports, walking, jobs around the house and helping elderly parents.

13. He submitted that the evidence relied upon by the tribunal was in conflict with a previous finding of a tribunal on 15 January 2018, that the current tribunal erred in relying on that report and that the treatment received in the aftermath of the industrial accident illustrated that it was more than a "soft tissue injury" as found by the tribunal.

14. Mr Arthurs generally submitted that the tribunal had asked itself the correct relevant questions and had given clear reasons for its conclusions. He submitted that an appeal on point of law should not be permitted to become a re-hearing or further assessment of the evidence before the tribunal.

Hearing

15. I held an oral hearing of the application. Due to restrictions arising from the Covid-19 pandemic, I directed that the hearing should take place by way of an online video hearing. Mr S.. attended and was unrepresented. The Department was represented by Mr Kirk. I am grateful to each for their submissions.

16. The appellant took me through the history of injuries he sustained in the course of service as an ambulance service paramedic. These included injuries from a road traffic accident in 2000 when a car hit the back of the ambulance and from another in 2004 where the ambulance skidded on black ice and turned over. He sustained back injuries that troubled him from those events and in 2012 he underwent surgery involving L4/5 disc decompression and insertion of a spacer. After that he went back to work full time and carried out all normal duties, including heavy lifting such as would be involved in carrying patients downstairs. There was another event in 2013 when he was kicked in the knee by a man who was high on drugs and carrying a knife, when he was off for two weeks.

17. He described the accident in 2014, which occurred when he was in the back of an ambulance attending to a patient, when its handbrake failed and it ran downhill and smashed into a house. He was thrown around in the back of the ambulance. He was off work for a while and saw a physiotherapist and occupational health doctor. He wanted to return to work and saw a consultant privately and had an MRI scan. He had a pain injection into his back.

18. He received physiotherapy but was told that he needed an operation. He had a second back operation in 2016 involving L4/5 L5/S1 fusion and decompression. He returned to work but not as a paramedic, as he was not permitted to lift anything weighing over 5kg. He was unable to return to his own job and left the ambulance service after 30 years. He described his physical health restrictions and his mental health issues arising from this situation. He continued to have physical restrictions and experienced low mood and social avoidance.

19. Mr Kirk submitted that the first tribunal had made a provisional assessment that was open to them on the evidence, and that the second tribunal had examined the medical history and made similarly reasonable conclusions. He directed me to an MRI report with date stamp 6 March 2012 which had indicated a diagnostic conclusion of lumbar spondylosis, L4/L5 disc protrusion with traversing L5 nerve root impingement and foraminal stenosis with potential exiting right L5 nerve root impingement. He observed that the entry of 30 October 2013 in the GP records supported the tribunal's findings and appeared to be the evidence relied upon of ongoing back pain prior to August 2014 in the statement of reasons. The attendance of 30 October 2013 related to the appellant's attendance for acute knee pain, but also involved a review of his low back pain. He observed that the specialist members of the tribunal had examined the appellant and that the tribunal was entitled to rely upon the expertise of its members.

20. Mr Kirk made a further submission in the interests of the appellant relating to the fairness of the proceedings. This was on the basis of procedural fairness. He observed from the record of proceedings that one of the medical members had recognised the appellant. After the evidence had been given and after the examination of the appellant, the panel member

had raised this with the LQM. The appellant was recalled to the hearing room and the LQM had disclosed to him that a medical member recognised him. The appellant had indicated that he was content for the tribunal as then constituted to decide the case, rather than adjourn for a newly constituted tribunal. In the course of the hearing before me, the appellant accepted that, even if it had been put to him at the beginning of the hearing, he would have trusted the professional detachment of the medical member.

Assessment

21. 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.

22. 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.

23. 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.

24. No case is advanced on the basis that the tribunal has misunderstood or misapplied the law. Mr Kirk raises an issue of procedural fairness. The appellant raises a case based on the reasonableness of the tribunal's findings. I consider that an arguable case arises on the complex facts of the case and on the procedural fairness basis advanced by Mr Kirk, and therefore I grant leave to appeal.

25. Dealing with the issue of procedural fairness first, I observe that there is some merit in the submission of Mr Kirk. After his recognition by a member of the tribunal was raised, the appellant indicated that he was happy to proceed. However, the circumstances in which he exercised that choice were problematic. After giving evidence and having been examined, any appellant would naturally be reluctant to adjourn to a new tribunal to restart the process. I consider that this would influence the free exercise of choice. It would have been preferable for the tribunal to have put the issue of recognition at the outset of the hearing. However, it appears that the recognition was not immediate and I cannot fault the tribunal for that.

26. Nevertheless, the appellant indicated at the tribunal hearing that he was content to proceed. In the hearing before me, he was candid in accepting that there had not been procedural unfairness in exercising that choice at the time. He indicated that any connection was a long time in the past and that he would have expected professional detachment from the medical member whether he recognised him or not. Therefore, while Mr Kirk has

made a fair point on the appellant's behalf, I do not accept that there was actual or perceived bias in the case.

27. The tribunal found that the injury suffered in the back of the ambulance on 22 August 2014 was not, by 17 January 2019, the cause of the vast majority of the appellant's symptoms. It found that the accident would be responsible for less than 1% of the symptoms, there having been a gradual lessening of the effect of the accident over the passage of time. In explaining this decision, it noted his long history of spinal problems which pre-existed the accident of August 2014. It referred to lumbar spondyloisis with foraminal spinal stenosis. It made reference to an entry in GP records from October 2013 indicating that the appellant's low back pain flared at times and that he was prescribed Baclofen and Naproxen and significant daily analgesia. It considered that the second MRI in 2015 was indicative of the progression of the pre-existing problems. In other words, it characterised the accident of August 2014 as causing a temporary exacerbation of a pre-existing back condition which was on a course of deterioration irrespective of the accident.

28. The case made by the appellant was that between the operation in 2012 and the accident in August 2014 he was not experiencing back symptoms that would interfere with his work duties, including lifting patients. The situation after the accident was that he could never work as a paramedic again. He pointed to the acceptance by the first tribunal that the symptoms caused by the accident lasted from 2014 to 2019, leading to the provisional award of 30% loss of faculty with 5% reduction due to the underlying back condition. He relied on the report of Mr Eames that the accident exacerbated existing symptoms resulting in the need for further surgery.

29. In order to establish error of law by a tribunal, when relying on argument around the conclusions drawn by the tribunal from the evidence, it is not sufficient to demonstrate that I, or a different tribunal, might have arrived at an alternative conclusion. It has to be demonstrated that the evidence compelled a different conclusion. In tribunals such as the present one, which involves two medical consultants, the knowledge, experience and expertise of those specialist members must also be respected.

30. The appellant's case, in essence, is that prior to August 2014 he was not experiencing significant back symptoms and that these were entirely exacerbated by the accident, leading to further unsuccessful surgery in 2016. The tribunal was addressing circumstances as they were in January 2019. It was clear that the appellant had significant back symptoms at that date and continuing since then. There is a certain logic in the appellant's argument which attributes all his symptoms to the accident of August 2014.

31. However, the tribunal took a different view. It considered the MRI report of 2012 which established that the appellant had lumbar spondyloisis with foraminal spinal stenosis. It noted from the appellant's GP records that as far as his back condition was concerned prior to August 2014, he was not entirely symptom free, finding that he was on Baclofen, Naproxen and

significant daily analgesia. It referred to an entry in the appellant's GP records in October 2013 that indicated that low back pain flares at times.

32. There is a confusing reference in the context of the GP encounter of October 2013 where the reasons for the decision record that the GP entry reads "low back pain flares at times, advises operation and is keen for some additional input". Having examined this entry in the GP records, I do not see any reference to an operation being advised at that date. The actual entry indicates, in the context of low back pain, "flares at times despite op so keen for something additional to paracet[amol]". It refers to side effects with codeine/tramadol and refers to what I understand to be kidney function side effects of Ibuprofen. The GP appears to prescribe Baclofen and Naproxen at that date.

33. As it does not otherwise make sense, I am satisfied that the statement of reasons has substituted the word "advises" for the word "despite" in error. There is no other reference to an operation being advised. While this might appear significant, I am satisfied that this is merely a typographical error introduced by the LQM or the tribunal administration. There is nothing to suggest that the tribunal was misled into understanding that a further operation was being considered in October 2013 when it was reaching its overall conclusions.

34. The general point being made in the reasons was that the appellant was not as free from symptoms prior to the accident of August 2014 as he had indicated. He was experiencing flare-ups and taking significant analgesia. The erroneous reference to an operation does not take away from that general reasoning. The tribunal noted the lumbar spondyloisis with foraminal spinal stenosis demonstrated by the MRI in 2012 and found that the second MRI in 2015 (which referred to significant degenerative changes) was indicative of the progression of those problems. The medical expertise of the tribunal members permitted them to make a refined interpretation of the evidence and in particular to address the correct weight to be given to the injuries resulting from the specific industrial accident some four and a half years after the event.

35. In order to find that there is an error of law in a tribunal's conclusions, it is not enough that there can be disagreement with them. It must be demonstrated that the evidence compels a different conclusion. The appellant points to the significant deterioration of his back in the wake of the accident of August 2014 as conclusive and submits that, but for this accident, he would still be at work. However, it appears to me from all the evidence that the situation was much more nuanced. The injury clearly took place against a background of steady degeneration of a pre-existing condition. The tribunal gave expert consideration to the evidence and conducted a physical examination of the appellant before reaching its decision. I consider that a tribunal which included specialist medical consultants was entitled to conclude that, by January 2019, the injury sustained in the ambulance in August 2014 was not the cause of the vast majority of the appellant's symptoms.

36. While I am naturally sympathetic to the appellant, and appreciate the constructive and helpful way in which he participated in the hearing before me, I do not consider that the tribunal has erred in law. I must therefore disallow the appeal.

(signed): O Stockman

Commissioner

26 May 2021