

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

UNIVERSAL CREDIT

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 31 August 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an application by a claimant for leave to appeal from the decision of a tribunal with reference LV/1479/23/05/U.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998.
3. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

4. The issue in this case is whether a tribunal erred in law by holding that the appellant did not have limited capability for work.
5. The appellant had made a claim for universal credit (UC) to the Department for Communities (the Department) and had been awarded UC from 18 February 2023. On 14 November 2022 the appellant returned a UC50 questionnaire to the Department answering questions about his capacity to perform certain activities. On 23 January 2023 the appellant attended a medical examination with a healthcare professional (HCP) and the Department received a copy of the HCP's report. On 18 March 2023 the Department decided on the basis of all the evidence that the appellant did not have limited capability for work and was entitled to UC only at the standard rate. The appellant requested a reconsideration. On 4 April 2023

the decision was reconsidered by the Department but not revised. The respondent appealed.

6. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) sitting with a medical member on 31 August 2023. The tribunal disallowed the appeal. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 24 October 2023. The appellant applied to the LQM of the tribunal for leave to appeal to the Social Security Commissioner. The LQM refused the application by a determination issued on 20 December 2023. On 16 January 2024 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

7. The appellant, represented by Community Advice Causeway, submits that the tribunal has erred in law on the basis that:
 - (i) It gave inadequate reasons for holding that attending a Men's Shed project and obtaining a tribunal representative amounted to evidence of ability to engage with other people.
 - (ii) It failed to explore the evidence around the appellant's experience when attending a Men's Shed and engaging with his tribunal representative.
8. The Department was invited to make observations on the appellant's grounds. Mr Rush 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 on the grounds submitted. However, he raised a different point of possible procedural fairness in the appellant's interests. Community Advice Causeway duly responded to the Department's submission, reiterating the appellant's grounds.

The tribunal's decision

9. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that it had documents before it consisting the Department's submission and Schedule of Evidence, extracts from the appellant's general practitioner (GP) records, a submission from the appellant's representative and Appeals Service documents relating to the proceedings. The appellant did not attend the hearing and was not represented at the hearing. The tribunal referred to an AT6 form that indicated that the appellant did not intend to attend a hearing and decided to proceed in the appellant's absence. However, the AT6 is not in the papers before me.
10. The tribunal noted the evidence relating to the appellant's physical and mental health. The submission on his behalf disputed the points awarded by the Department in respect of physical descriptor 2.c, due to

osteoarthritis of the spine, and mental health descriptors 13.c, 14.c, 15.c and 16.c, due to depression and anxiety. The tribunal found that an x-ray in June 2022 showed minimal degenerative change and that medical management of his osteoarthritis did not suggest a significantly disabling condition. It similarly found that no medication was prescribed for the appellant's mental health issues and that he had not been referred to specialist mental health services. It found that he had an ability to interact with others on a social level on the basis that he was able to attend a Men's Shed project. It rejected a submission that he had a learning disability on the basis that he was able to complete forms and to instruct his representative. It further found that there would not be a substantial risk to the appellant or others if he was found not to have limited capability for work. It dismissed the appeal.

Relevant legislation

11. UC was established under the provisions of the Welfare Reform Order (NI) 2015 (the Order). The core rules provide for awards to include an amount in respect of the fact that a person has limited capability for work (article 17(2)(b) of the Order). They also amend work-related requirements where a claimant has limited capability for work (article 24(1) of the Order). By article 43 of the Order:

43—(1) For the purposes of this Part a claimant has limited capability for work if—

- (a) the claimant's capability for work is limited by his or her physical or mental condition, and
- (b) the limitation is such that it is not reasonable to require the claimant to work.

(2) For the purposes of this Part a claimant has limited capability for work-related activity if—

- (a) the claimant's capability for work-related activity is limited by his or her physical or mental condition, and
- (b) the limitation is such that it is not reasonable to require the claimant to undertake work-related activity.

(3) The question whether a claimant has limited capability for work or work-related activity for the purposes of this Part is to be determined in accordance with regulations.

...

12. The Universal Credit Regulations (NI) 2016 further provide at Part V and Schedules 6 to 9 for determining if a claimant has limited capability for

work. Regulation 40 provides for a specific test of limited capability for work.

40.—(1) A claimant has limited capability for work if—

- (a) it has been determined that the claimant has limited capability for work on the basis of an assessment under this Part or under Part 4 of the ESA Regulations, or
- (b) the claimant is to be treated as having limited capability for work (see paragraph (6)).

(2) An assessment under this Part is an assessment as to 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 6 or is incapable by reason of such disease or bodily or mental disablement of performing those activities.

(3) A claimant has limited capability for work on the basis of an assessment under this Part if, by adding the points listed in column (3) of Schedule 6 against each descriptor listed in column (2) of that Schedule that applies in the claimant's case, the claimant obtains a total score of at least—

- (a) 15 points whether singly or by a combination of descriptors specified in Part 1 of that Schedule,
- (b) 15 points whether singly or by a combination of descriptors specified in Part 2 of that Schedule, or
- (c) 15 points by a combination of descriptors specified in Parts 1 and 2 of that Schedule.

(4) In assessing the extent of a claimant's capability to perform any activity listed in Schedule 6, it is a condition that the claimant's incapability to perform the activity arises—

- (a) in respect of any descriptor listed in Part 1 of that Schedule, from a specific bodily disease or disablement,
- (b) in respect of any descriptor listed in Part 2 of that Schedule, from a specific mental illness or disablement, or
- (c) in respect of any descriptor or descriptors listed in—
 - (i) Part 1 of that Schedule, as a direct result of treatment provided by a registered medical practitioner for a specific physical disease or disablement, or

- (ii) Part 2 of that Schedule, as a direct result of treatment provided by a registered medical practitioner for a specific mental illness or disablement.

(5) Where more than one descriptor specified for an activity applies to a claimant, only the descriptor with the highest score in respect of each activity which applies is to be counted.

(6) Subject to paragraph (7) a claimant is to be treated as having limited capability for work if any of the circumstances set out in Schedule 8 applies.

(7) Where the circumstances set out in paragraph 4 or 5 of Schedule 8 apply, a claimant may only be treated as having limited capability for work if the claimant does not have limited capability for work as determined in accordance with an assessment under this Part.

- 13. Within Schedule 6 there are ten physical descriptors (including functions such as mobilising) and seven mental descriptors (including functions such as learning tasks).

Submissions

- 14. The appellant's representative submitted that the tribunal erred by taking attendance at a Men's Shed into account as evidence of ability to engage socially, as the Men's Shed project allows for social interaction for those who seek it and lone working for those who have a severe anxiety. It was submitted that the Men's Shed was a therapeutic environment and that the tribunal had insufficient evidence of the nature of the appellant's engagement to formulate a conclusion on his ability to engage socially.
- 15. The appellant's representative further submitted that the tribunal erred in law by taking account of the appellant's ability to engage with the Appeals Service and to instruct his representative. It was submitted that he had 14 consultations in order to help him understand letters and manage his appeal proceedings – of which five were in person, involving travel by his representative to Limavady to facilitate him as he could not have travelled to Coleraine on his own. It was submitted that this was evidence of learning disability, rather than the converse as found by the tribunal.
- 16. Mr Rush had responded for the Department. He first commented on the circumstances of the tribunal proceeding to determine the appeal in the absence of the appellant and his representative. He referred to the Tribunal of Commissioners decision in *RGS v Department for Social Development* [2016] NI Com 39. Whereas he also did not have sight of the AT6 form, he submitted that a potential error of law had occurred on the basis that it was not clear that the appellant had unambiguously waived his right to attend an oral hearing of his appeal.

17. He then turned to the appellant's grounds of appeal. He submitted that, although the evidence that was before the tribunal in relation to the Men's Shed Project was sparse, it was reasonable for the tribunal to make the findings it did from all the evidence that was before it. He referred in particular to an extract from the HCP report that, "He does not report social outlets currently ... He can speak with a locum GP ... He can go to larger shop alone, can pass himself with shop staff. He can cope if the shop is busy ...".
18. He submitted that the tribunal had not construed the appellant's engagement with his representative as evidence of ability generally. Rather, he submitted that there was no evidence to support the assertion that the appellant had learning difficulties. Even if I was to accept that the tribunal had drawn incorrect conclusions about the appellant's ability from his engagement with a representative, he submitted that there was no medical evidence of learning disability before the tribunal. As there was insufficient evidence for it to conclude that the appellant had learning difficulties, its conclusions did not vitiate the decision.
19. In response, the appellant's representative continued to submit that the tribunal had insufficient evidence, in terms of how often the appellant attended the Men's Shed and whether he engaged in group work or not, to use it to base a conclusion that he could engage socially. It was further submitted that reaching out to an advice centre in itself could amount to evidence of inability.

Assessment

20. 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.
21. 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.
22. 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.
23. The issue of whether the tribunal acted in a procedurally unfair manner in deciding the appeal in the appellant's absence has been raised by the Department in the appellant's interests. I will grant leave to appeal on the basis that the Department considers there to be an arguable case of error of law on this point, and on the appellant's first ground of appeal.

24. On the issue of procedural fairness, I gave consideration to the question of whether I should direct the production of the missing AT6 document in order to clarify the circumstances leading to the tribunal's decision to proceed in absence. However, despite the issue being raised by Mr Rush, it is not an issue that the appellant's representative has engaged with. This leads me to consider that the appellant is satisfied that no procedural unfairness has occurred and was content that the tribunal proceeded in his absence. I will not investigate this aspect further by seeking a copy of the missing AT6. I do not accept that the tribunal has erred in law on this ground.
25. Turning first to the appellant's second ground, I accept the submission of Mr Rush that there was no evidence of learning disability before the tribunal. I observe the submission of the appellant's representative to the effect that seeking advice *per se* constitute evidence of learning disability. I accept that a large percentage of people who seek advice would be people with illness and disability, but this does not mean that any particular advice client has any illness or disability. I reject the appellant's submissions on this ground.
26. Returning to the appellant's first ground, I do accept that there is merit in the submission advanced. While Mr Rush points to general evidence in the HCP report, such as engaging with a locum GP and shop assistants in a large shop, the tribunal has made very specific findings that attending the Men's Shed would suggest an ability to interact with others on a social level. I accept the submission made by the appellant's representative that the tribunal did not have evidence of how often the appellant attended the Men's Shed and whether he engaged in group work or not. I do not consider that attendance at the Men's Shed in the absence of any account of what occurred there was a sufficient basis for the tribunal's finding. I accept that it is a therapeutic setting and that caution must be applied when extrapolating attendance there into social engagement.
27. I consider that I should allow the appeal on this basis. I set aside the decision of the appeal tribunal and I refer the appeal to a newly constituted tribunal for determination.

(Signed): O STOCKMAN

COMMISSIONER

25 September 2024