[2013] AACR 33

(ML v Secretary of State for Work and Pensions (ESA)
[2013] UKUT 174 (AAC))

Judge Jacobs **CE/3261/2012**
8 April 2013

Work-related activity – whether regulation 35 is dictated by regulation 29 – need for sufficient information about work-related activity – relevance of an award of disability living allowance

As part of the conversion process from incapacity benefit to employment and support allowance (ESA), the appellant completed a questionnaire and was interviewed and examined by a health care professional. In her questionnaire, the appellant said that she had problems with mobilising and initiating actions. The health care professional (a surgeon) found no disability relevant to ESA. Having received this evidence, the Secretary of State decided that the appellant was not entitled to ESA. The appellant appealed against that decision to the First-tier Tribunal (F-tT) and submitted documentary evidence including letters from her GP and her consultant. The F-tT decided she was entitled to ESA as she was unable to mobilise more than 100 metres and also satisfied regulation 29(2)(b) (but not regulation 35). The appellant appealed against that decision to the Upper Tribunal (UT) on two grounds: (i) her entitlement to disability living allowance (DLA) proved she was unable to walk 100 metres; and (ii) she satisfied regulation 35. The primary issue before the UT was the difference between regulations 29(2)(b) and 35(2)(b) of the Employment and Support Allowance (ESA) Regulations 2008.

Held, dismissing the appeal, that:

1. the outcome of regulation 29 would not have necessarily dictated the outcome for regulation 35. Each regulation used similar wording but it did so for different purposes: regulation 29 was concerned with the risk of work and regulation 35 with the risk of work-related activity. There was no reason why the former would have automatically determined the latter. Rather this would depend upon: (i) the nature of the claimant's condition; (ii) its effects; and (iii) the nature of the work-related activity (paragraph 14);

2. the Secretary of State must provide sufficient information about work-related activity to enable a claimant to present a case and for a tribunal to make a decision, thereby ensuring that a statutory right of appeal was effective. In this case there had been sufficient information available to the F-tT for it to make a decision (paragraph 15 to 17);

3. the fact that the appellant had an award of DLA of the higher rate mobility component cannot of itself be directly related to the mobilising activity in Schedule 2; more evidence was needed about how her mobility was restricted and at what point it gave rise to significant discomfort or exhaustion (paragraph 18).

Editor's note: this is a companion decision to *AH v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 118 (AAC); [2013] AACR 32

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC240/11/01625, made on 30 April 2012 at Bradford, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. The issue

1. This is a companion decision to *AH v Secretary of State for Work and Pensions* [2013] UKUT 118 (AAC); [2013] AACR 32, which deals with the application of the decision of the

Court of Appeal in *Charlton v Secretary of State for Work and Pensions* [2009] EWCA Civ 42, reported as R(IB) 2/09, to regulations 29 and 35 of the Employment and Support Allowance Regulations 2008 (SI 2008/794).

2. The issue in this appeal is whether a claimant who satisfies regulation 29(2)(b) thereby satisfies regulation 35(2)(b). The answer is: no. The application of regulation 35 does not automatically follow from that of regulation 29. It depends on the nature of the claimant's condition and of the work-related activity that she would be expected to undertake. I have also decided that claimants and tribunals have to be given sufficient information about work-related activity to allow the claimants' right of appeal to be effective.

A. The Secretary of State's decision

3. Mrs L had been entitled to incapacity benefit from 1996. In 2011, the Secretary of State decided to consider whether her entitlement could be converted to employment and support allowance. She completed a questionnaire and was interviewed and examined by a health care professional. In her questionnaire, she said that she had problems with two activities: mobilising and initiating actions. She attributed both to vertigo. The health care professional (a surgeon) found no disability relevant to employment and support allowance. Having received this evidence, the Secretary of State decided that Mrs L was not entitled to employment and support allowance from and including 31 August 2011.

B. The legislation

4. A claimant may be entitled to an employment and support allowance by being (a) incapable of work or (b) incapable of work-related activity. Claimants who satisfy (a) have to undertake activity designed to assist them to become capable of work and are said to be in the work-related activity group. Claimants who satisfy (b) are said to be in the support group, do not have to undertake work-related activity and receive a higher payment.

5. There are various ways in which claimants can show entitlement to an employment and support allowance. Only two are relevant to this appeal. One is by scoring 15 or more points in respect of a series of functional descriptors. The other is by showing the effect of their condition if they had to undertake work or work-related activity. This appeal concerns the latter

6. Regulation 29(2)(b) controls entry to the work-related activity group. As in force at the time of this case, it provided:

> "**29 Exceptional circumstances**
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> …
>
> (2) This paragraph applies if –
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> …
>
> (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."

7. Regulation 35(2)(b) controls entry to the support group. It provides:

> "**35 Certain claimants to be treated as having limited capability for work-related activity**
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> …
>
> (2) A claimant who does not have limited capability for work-related activity as determined in accordance with regulation 34(1) is to be treated as having limited capability for work-related activity if –
>
> (a) the claimant suffers from some specific disease or bodily or mental disablement; and
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> (b) 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-related activity."

C. The appeal to the First-tier Tribunal

8. Mrs L exercised her right of appeal to the First-tier Tribunal. In support of her appeal, she provided letters from her GP and her consultant together with a number of hospital letters and documents dating back to 2001. Her GP wrote that:

- her attacks of vertigo were unpredictable and could render her housebound;
-
- her medication was not always effective;
-
- she was also depressed and related insomnia, contributing to physical and mental fatigue.

Her consultant wrote that:

> "Based on the consultation dated 9th December 2011 the current issues are right sided variably intrusive tinnitus which can disturb her sleep pattern. There are no discreet episodes of vertigo but any sort of head or body posture change gives rise to a feeling of imbalance with low grade nausea. This constant situation throughout the day gives rise to fatigue which further exacerbates her symptoms. This therefore requires her to have support from her partner when she is outside her home and familiar environment.
>
> Her symptoms do fluctuate in that at their worst her stability is zero % but at best is 20% of what she would consider is normal and typically is around 10%. …
>
> The whole situation gives rise to anxiety and stress which then exacerbates the physical symptoms."

9. The tribunal heard evidence from Mr and Mrs L, both of whom it found credible witnesses. It then decided that she scored nine points as she could not mobilise more than 100 metres but also satisfied regulation 29(2)(b), as "she is unable to sustain sufficient activity for her to be able to undertake employment". As a result, she was entitled to employment and support allowance on conversion and placed in the work-related activity group. The tribunal decided that she did not satisfy regulation 35. Its key findings were:

> "The problem with balance affects her if she is in any position other than lying down. She does not feel comfortable sitting down because her head never feels stable. When she walks she feels sea sick, unsteady and unsafe because of the sensations she has in her head. It affects her concentration and makes her tired.
>
> The activity of walking requires a lot of concentration and she gets tired quickly. If she is tired then she will experience a spinning sensation and she would need to lie down. The level of activity she can tolerate is limited. For example, the effort, time and concentration involved in doing a supermarket shop means that she cannot do this activity. However, she is able to go to a single shop such as the post office or the bank.
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> Mrs L… is able to drive but only short distances. She gets a warning if she is going to experience spinning.
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> There are no days when she is able to survive all day without having to spend part of the day in bed.
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> She is physically able to walk but as she walks the problem gets worse. She has to concentrate on staying upright and as a result she soon becomes physically and mentally exhausted. Taking into account these difficulties the tribunal find that Mrs L… is unable to mobilise more than 100 metres."

D. The appeal to the Upper Tribunal

10. Mrs L applied for permission to appeal on two grounds: (i) she had the mobility component of disability living allowance at the higher rate, which indicated that she could not walk as far as the tribunal found; and (ii) she should have satisfied regulation 35. I gave her permission, saying:

> "I have given permission, because there is a good reason to do so. This is, as far as I know, the first case that has raised the issue of the difference between regulations 29(2)(b) and 35(2)(b) of the Employment and Support Allowance Regulations 2008 (SI No 794). The tribunal found that Mrs L satisfied the former, but not the latter. It explained why, but was its brief reasoning adequate? Should it have dealt in more detail with what the work-related activity might involve? Was there sufficient evidence of this? Is there any guidance that the Upper Tribunal could usefully give when both provisions are in issue.
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> I also note that the Department's *Medical Services Handbook for ESA* says:
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> > 'It should be noted that regulations specify that this NFD must be considered separately for LCW and LCWRA. Therefore HCPs must give careful consideration as to whether it applies to both LCW and LCWRA or to LCW alone. However, it is extremely unlikely that someone who is at substantial risk for work would not be at substantial risk for work related activity and therefore for all practical purposes it is likely that it will apply to both.'"

11. I need to translate those acronyms:

> NFD = non-functional descriptor = regulations 29(2)(b) and 35(2)(b)
>
> LCW = limited capability for work = work-related activity group

LCWRA= limited capability for work-related activity = support group

HCP = health care professional

12. The Secretary of State's representative has not supported the appeal. He has submitted that the aims of regulations 29(2)(b) and 35(2)(b) are different. The former is concerned with the effects of work; the latter is concerned with the effects of work-related activity. The work-related activity would be steps "to identify and overcome any barriers preventing a return to work". By her own evidence, Mrs L was able to drive for short periods, self-care, dress, do some basic cooking, shop for clothes, reads books, watches television, uses a mobile phone, manage banks and post offices although not supermarkets. Given that evidence, she would be able to attend a meeting with an adviser and undertake some suitable work-related activity. Further than this it was impossible to go, because "a tribunal is unable to define that work related activity any further as that is the role of the Jobcentre Plus personal adviser, in conjunction with the claimant".

13. As to the passage I quoted from the *Handbook*, the representative says that this is guidance only and that "it is not correct to assume that simply satisfying one NFD means that another of similar wording is also satisfied".

E. Conclusions – regulation 35

14. I accept the argument that the passage from the *Handbook* is at best guidance and incorrect. Regulations 29 and 35 use similar wording, but they do so for different purposes. The claimant's condition is a constant for both provisions. But the activities to which the provisions apply differ. The former is concerned with the risk of work; the latter is concerned with the risk of work-related activity. There is no reason why the former should automatically be determinative of the latter. This will depend on: (i) the nature of the claimant's condition; (ii) its effects; and (iii) the nature of the work-related activity. It may be that the condition will give rise to the same risk whether the claimant undertakes work or work-related activity. Or it may give rise to different risks. Or it may give rise to risk in respect of one but not the other.

15. Despite having dealt with numerous cases involving the support group, I still have no idea of what work-related activities involves beyond the general, formulaic statements such as those I have quoted from the Secretary of State's argument. I accept that it is not possible to say in advance what precisely would be expected of any particular claimant. However, it must be possible to give a sufficient indication of what is involved in order to allow a claimant to provide evidence and argument, and to allow a tribunal to make a decision. The decision whether or not a claimant satisfies the conditions for the support group carries the right of appeal to the First-tier Tribunal under section 12 of the Social Security Act 1998. It is not one of those decisions that are excluded from the right of appeal. The existence of a statutory right of appeal requires that it must be effective. It cannot be effective without the necessary information for claimants to participate in the appeal and for the tribunal to make a decision.

16. In this case, there was sufficient information for the tribunal to make a decision. Whatever work-related activity may involve, Mrs L should be able to undertake it. She is able to travel and even to drive herself short distances. She was able to attend and endure an interview and examination with the health care professional, which lasted for 51 minutes. She is able to attend to her own basic needs, to manage short trips, and to attend to her business in shops, her bank and the post office. I accept the Secretary of State's submission to that effect**.**

17. Although Mrs L had not put her case in quite this way, it would be fair to state it like this. The tribunal has accepted that I am not able to sustain sufficient activity to be capable of work and my condition is not going to improve, so what is the point of making me undertake activity to prepare me for work of which I will never be capable? The answer is that the law is not structured in that way. There are claimants who are not capable of work and never will be capable of work but whose condition and disabilities are not such that they can satisfy the conditions for the support group. To put it another way, the support group is not for those who will never be capable of work. It is for a narrower category. That may explain why, by Mrs L's report, her Jobcentre Plus adviser has not asked her to undertake any work-related activity.

F. Conclusion – disability living allowance

18. Finally, I need to deal with Mrs L's argument on her award of the mobility component of disability living allowance at the higher rate. This is evidence that, at the time of the award of disability living allowance, Mrs L had limited mobility sufficient to qualify for the mobility component at the higher rate. However, without more information it is impossible to relate it to the specific terms of the activity of mobilising in Schedule 2. That would require more evidence about how her mobility was restricted and at what point it would give rise to significant discomfort or exhaustion. And if that evidence is necessary, the question arises: what value does the fact that the claimant has an award of the mobility component add to her case? It is possible that in many, if not most, cases the answer will be: little or nothing. In other words, it is the evidence that matters, not the award.