

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 6 November 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by a claimant, now deceased, from the decision of an appeal tribunal with reference CR/927/19/51/P.
2. For the reasons I give below, I allow the appeal under Article 15(8)(a) of the Social Security (NI) Order 1998. I set aside the decision of the appeal tribunal. I make findings of fact and I decide that the late appellant had limited capability for work-related activity from 7 November 2018.

REASONS

Background

3. The appellant had been in receipt of employment and support allowance (ESA) from the Department for Communities (the Department) by reason of epilepsy. On 17 September 2018 the appellant completed and returned an ESA50 questionnaire to the Department regarding his ability to perform various activities. On 1 November 2018 a health care professional (HCP) examined the appellant on behalf of the Department. On 2 November 2018 a report was obtained from the appellant's general practitioner (GP). On 7 November 2018 the Department considered all the evidence and determined that the appellant had limited capability for work, but did not have limited capability for work related activity, and made a decision that the appellant's was not entitled to an award of the support component of ESA. The appellant appealed, but waived the right to an oral hearing of his appeal.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM) and a medically qualified member on 6 November 2019. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 5 March 2020. In the interim period, sadly, the appellant had died.
5. The appellant's widow applied to the LQM for leave to appeal from the decision of the appeal tribunal, and was appointed to continue her late husband's appeal. I will subsequently refer to her as "the appointee". Leave to appeal was granted by a determination issued on 29 July 2020. The ground on which leave to appeal was granted was whether the tribunal had fully considered the appellant's medical conditions and his epilepsy in particular. On 3 September 2020 the appointee submitted the appeal to the Social Security Commissioner.

Grounds

6. The appellant submits that the tribunal has erred in law on the basis that the risks arising from the appellant's epilepsy restricted all his activities, such as volunteering, that he was refused opportunities due to his condition and that his death was related to epilepsy.
7. The Department was invited to make observations on the appellant's grounds. Mr Collins of Decision Making Services (DMS) responded on behalf of the Department. He submitted that the tribunal had erred in law and indicated that the Department supported the application. He asked the Commissioner to decide the appeal in all the circumstances.

The tribunal's decision

8. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission along with two further submissions. The documents before the tribunal included a copy of the ESA50 self-assessment questionnaire, an ESA113 GP factual report and the current ESA85 HCP report. They further included a previous HCP report from June 2016 and copy decisions, letters from the appointee, a DLA report from an epilepsy support nurse dated 16 July 2014 and miscellaneous documents including a Workable (NI) Development Plan dated December 2010 and a letter from the epilepsy nurse dated December 2018.
9. As the right to an oral hearing had been waived, the appeal proceeded by way of a "paper hearing" in the absence of the parties. The tribunal noted in particular that the appellant volunteered for charity shops. It noted that he experienced no-warning seizures, followed by some disorientation. It found that the appellant did not satisfy descriptors in any of the activities in Schedule 3. On the basis that he volunteered, it found that there were work situations that did not present a substantial

risk to him or others. It allowed the appeal on limited capability for work but disallowed it on limited capability for work related activity.

Relevant legislation

10. ESA was established under the provisions of the Welfare Reform Act (NI) 2007 (the 2007 Act). The core rules of entitlement were set out at sections 1 and 8 of the 2007 Act. These provide for an allowance to be payable if the claimant satisfies the condition that he or she has limited capability for work. The Employment and Support Allowance Regulations (NI) 2008 (the ESA Regulations) provide for a specific test of limited capability for work. In particular, regulation 19(2) provides for a limited capability for work assessment as an assessment of 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 2 of the ESA Regulations, or is incapable by reason of such disease or bodily or mental disablement of performing those activities.
11. Regulation 34 provided for the determination of an additional test of limited capability for work related activity. This involved an assessment of 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 3 of the ESA Regulations, or is incapable by reason of such disease or bodily or mental disablement of performing those activities. Regulation 35 further provided for a claimant to be treated as having limited capability for work related activity, as follows:

35.—(1) A claimant is to be treated as having limited capability for work-related activity if—

(a) the claimant is terminally ill;

(b) the claimant is—

(i) receiving treatment for cancer by way of chemotherapy or radiotherapy,

(ii) likely to receive such treatment within 6 months after the date of the determination of capability for work-related activity, or

(iii) recovering from such treatment

and the Department is satisfied that the claimant should be treated as having limited capability for work-related activity; or

(c) in the case of a pregnant woman, there is a serious risk of damage to her health or to the health of her unborn child if she does not refrain from work-related activity.

(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

(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.

Submissions

12. The appellant has been granted leave to appeal, not by the particular LQM but by the salaried legal member, on the question of whether the appellant's medical conditions, in particular epilepsy, have been fully considered by the tribunal.
13. Mr Collins for the Department made observations on the appeal. He noted that the appellant was awarded ESA from and including 07 April 2012, not 11 April 2018 as stated in the Department's submission contained in the case papers.
14. He noted that the basis of appointee's application was that the appellant was limited for work-related activity. She submitted that he was limited in the activities he could do where he volunteered and that in 2019 he was refused a similar volunteering opportunity due to his epilepsy. It was submitted that there was risk with everything he did and that his death had been due to epilepsy.
15. Mr Collins submitted that there have been a number of Great Britain Commissioners decisions which have considered work related activity. He submitted that in *KC & MC v SSWP* [2017] UKUT 94 (AAC) it was held that where risk was an issue the decision maker is required to predict what work related activity a claimant might be required to undertake and the tribunal should be provided with evidence about the types of work related activity available. In the absence of such evidence the tribunal can decide the issue for itself or consider adjourning.
16. He noted that in the circumstances of the present case the Department had provided appendices with its submission which explained the implications of being in the work-related activity group (WRAG) and provided examples of the types of services and activities available to the appellant. The Department's submission to the tribunal (paragraphs 12 and 13) also provided relevant information on the WRAG.
17. Mr Collins observed that in paragraphs 5 and 6 of its reasons the tribunal outlined its approach to consideration of whether the appellant had LCWRA:-

“5. To be considered as entitled on the basis of having limited capability for related activities he must demonstrate he comes within schedule 3....Entitlement is dependent upon at least one of the prescribed descriptors applying. In considering the activities there is a notion of reasonableness of performance and that the restriction applies for the majority of occasions.

6. Within the legislation there is also provision for treating someone as having limited capability for work related activities (Reg 35(2)). This relates to some specific disease, bodily or mental disablement and by reason of which there would be a substantial risk to their health or that of another.....”

18. He observed that the tribunal went on to conclude at paragraph 13:-

“13. We must seek to relate his condition to the activities in schedule 3. This does not specifically refer to epilepsy but the issue is not so much the underlying condition but the restriction. Having done so we cannot see how he can be treated as having limited capability for work-related activities. To his credit the appellant has offered his services to a charitable organisation. In itself however this would suggest that their potentially would be work situations open to him that did not present a substantial risk either to himself or others. As stated earlier this provision is directed towards a small exceptional category.”

19. Mr Collins submitted that the relevant legislation in relation to LCWRA (regulations 34 and 35 as referred to earlier in these observations) is clear that it is a claimant’s ability to perform work related activity and not the ability to work which is being assessed. He said:

“In my opinion the tribunal has inadvertently focussed on regulation 29 which is concerned with limited capability for work and risk. However I would submit that the tribunal has arguably conflated work related activity with work and substantial risk. Thus, I would submit that it renders its decision in error of law.”

20. Mr Collins pointed out that the tribunal also considered a variety of medical evidence, noting at paragraph 8 of its reasons, for example, that a report from a neurologist indicated his epileptic attacks were reducing in frequency – the report related to a clinic on 18 September 2018. In addition it referred at paragraph 11 to a medical report dated 21 December 2018 which stated that the appellant suffered from epilepsy from childhood and had not sustained periods of being seizure-free and

they could occur without warning. In paragraph 10 of its reasons the tribunal concluded that the HCP report was “*reliable*”. In addition at tab 14 a HCP who considered the nurse specialist letter dated 21 December 2018 was of the opinion that regulation 35 was “*unlikely*.”

21. While indicating that he would be normally cautious about the relevance of a report which postdates the tribunal’s decision, the report dated 21 December 2018 was completed by an Epilepsy Support Nurse and refers to the appellant being diagnosed with epilepsy at the age of two and a half and that throughout his life “he has not had any sustained periods of seizure freedom for any great length of time.” It is also stated the seizures occur with no warning, there is a risk of injury and he requires assistance with all activities of daily living at these times. In addition the epilepsy nurse stated that he has difficulties with memory and concentration - related to his seizures - and it is also noted that his seizure control does not seem to have improved despite all the various medication changes that have been tried over the years.
22. Mr Collins noted the report from a HCP dated 17 June 2013 which stated that the appellant “meets support group criteria” and “the available evidence suggests improvement is unlikely in the longer term.” He submitted that the letter from the epilepsy nurse in December 2018, when viewed in the context of this much earlier report is arguably evidence of the appellant dealing with major problems over a sustained period.
23. Mr Collins submitted that at paragraphs 8 and 10 of its reasons the tribunal appeared to have accepted the findings of the HCP and of a neurologist report dated 1 September 2018 which indicated that epileptic reports were “*reducing in frequency*”. However, this appeared to an extent to contradict the epilepsy nurse’s report. He noted the appointee’s contention that, when the medical report by the HCP on 17 June 2013 advised that the appellant met the support group criteria, he was doing similar work to that which he was doing at the time of his most recent appeal and that little had changed with her husband’s condition in the meantime.
24. He also submitted that, since during the course of the appellant’s award the Department had twice placed him in the support group – the most recent occasion being in 2017 after he had submitted an appeal, this further suggested the long term nature of the problems he experienced.
25. While he indicated understanding of the tribunal relying on the most recent HCP evidence, he submitted that the tribunal had failed to adequately address the HCP evidence in the context of all the evidence to which he had referred in the body of his observations. He submitted that the appointee had a right to expect a fuller explanation of why her contentions were rejected. He therefore supported the appointee’s appeal.

Assessment

26. I observe that each of the parties submits that the tribunal has erred in law. It would therefore be open to me to refer the appeal back to a newly constituted tribunal for redetermination. However, as the appellant died in the course of these proceedings, I do not consider that there is any utility in remitting the appeal.
27. I consider that there is force in the submissions of Mr Collins, which support the appeal brought by the appointee. Essentially the evidence demonstrates that the late appellant's condition presented a substantial risk not just if he was found to have limited capability for work, but also in the context of work-related activity. There are shortcomings in the reasons advanced by the tribunal in the context of all the evidence which are sufficient to give rise to an error of law. Therefore, I set aside the decision of the appeal tribunal. In all the circumstances of the case, I propose to dispose of this appeal under article 15(8)(a) of the Social Security (NI) Order 1998.

Disposal

28. I accept, which is not disputed, that the appellant had limited capability for work from and including 11 April 2018. I proceed to consider the question of limited capability for work-related activity from 7 November 2018.
29. The relevant legislative test appears in regulation 35 of the ESA Regulations. The material part of regulation 35 appears to me to be paragraph (2). This is satisfied where there would be a substantial risk to the mental or physical health of any person if a claimant, who suffers from some specific disease or bodily or mental disablement, were found not to have limited capability for work-related activity.
30. It is accepted that the appellant suffered from epilepsy.
31. The epilepsy support nurse confirmed that he had been diagnosed at the age of two and a half years and that he had not had any sustained periods of seizure freedom for any great length of time, despite many manipulations to his medication over time. It was reported that the appellant suffered from complex partial seizures with no warning, leading to the claimant being unaware of what he is doing or of his surroundings during that time. It was confirmed that the appellant might be seizure free for a few weeks at best and then experience 2-3 seizures in one week. He continued to take two anticonvulsant medications. It was also reported that he had difficulties with his memory and concentration.
32. The appellant's consultant neurologist described a less frequent pattern of seizures, describing these as occurring perhaps three times per month, but stating that some months he would have none.

33. The appellant's general practitioner indicated that most seizures were complex partial, but that the appellant had also experienced tonic clonic seizures. He referred to unsafe behaviour during the postictal (or recovery period) such as crossing roads. The epilepsy nurse had referred to an incident of opening a car door when it was still moving.
34. The Department's disability analyst in an ESA85A medical report form confirmed that the appellant experienced seizures without warning and was unaware of his surroundings during these, but was of the opinion that, as there was no mention of injuries during seizures or recent hospital attendances, the LCWRA (limited capability for work-related activity) risk "would not seem likely".
35. A previous disability analyst had taken the opposite view at an earlier date noting that the available evidence suggests that improvement is unlikely in the longer term, finding that there would be substantial risk if the appellant was found not to have limited capability for work or work related activity.
36. The types of work-related activity presented in evidence by the Department in support group literature includes:
 - Writing a diary of things you do each day to find out what skills you already have
 - Checking what jobs are available in your local area
 - Taking part in activities that are organised by local community groups aimed at helping you to feel better
 - Learning how to write a CV
 - Attending training courses to learn new skills
37. Whereas there are discrete aspects of these sorts of activities that are plainly benign and risk-free, the aspect of attending group activities away from the home would appear to be such as to create clear risks for the late appellant.
38. Evidence has been provided that the appellant was denied volunteering activities due to the perceived risk on the part of the relevant voluntary organisations. While I do not have direct evidence on the point, certain submissions from the appointee suggest that the appellant's death was related to his epilepsy. Regardless, however, the risk inherent in some of the work-related activity such as taking part in community group activities and attending training courses, where family members would not be present to give aid and assistance, are self-evident.
39. On the evidence before me I accept that the appellant satisfied the conditions of regulation 35 on the basis that there would be a substantial

risk to the mental or physical health of any person if a claimant, who suffers from some specific disease or bodily or mental disablement, were found not to have limited capability for work-related activity.

40. I allow the appeal and I find that the appellant had limited capability for work and limited capability for work-related activity from 7 November 2018.

(signed): O Stockman

Commissioner

20 January 2021