

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 May 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I grant leave to appeal. I deal with the substantive appeal, which I allow. I set aside the decision of the Tribunal sitting at Belfast on 31 May 2023 as being in error of law. I remit the matter back to a freshly constituted Tribunal with the following directions.

DIRECTIONS

2. The fresh appeal will be listed before a new tribunal, that is, one with none of the same members as previously. It will be listed as an oral hearing, and it is in the claimant's interests to attend, either in person, by phone or virtually, as he prefers, or as is practical.
3. He must tell the Appeals Service (TAS) in writing (post or email as is usual) which sort of hearing he would prefer within 14 days of the issue of this decision.
4. He should understand that the tribunal is looking at how his medical conditions affected his function at the date of the decision under appeal, 25 July 2022. The tribunal can consider things that have happened since then only if they shed light on what the position was likely to have been at that date.
5. A Chairman of TAS may make any further necessary listing directions.

REASONS

Proceedings before the Commissioners

6. As I am granting the application for leave to appeal, I refer to the applicant as either the appellant or the claimant.
7. The tribunal decision before me upheld the conclusion of the departmental decision maker, made on 25 July 2022, that the claimant did not have Limited Capability for Work (LCW) from the date of that decision.
8. The application for leave to appeal to the Commissioner was refused by the legal member of the tribunal that heard the appeal. I am looking again at that application.
9. The appellant is in person, and Mr Rush acts for the department. The claimant has asked for an oral hearing, but that is not necessary for justice to be done: I am able to decide the matter fairly on the papers before me.
10. The department has had the opportunity to make observations through Mr Rush. In his helpful submission he sets out the background to the claim and the appeal which has been of considerable assistance to me, and my history below is taken mainly from that. Whilst Mr Rush does not support the appeal, he is content that I decide it without further reference to the department if I decide to grant leave.
11. In all the circumstances I deal now with both the application for leave and the substantive appeal.

Background

12. The appellant made a claim for Universal Credit (UC) from and including 31 January 2022, based on his ill health, and he completed a questionnaire about his health problems and how they affected him (the UC50) some six months later, on 10 June 2022. He sent a letter from a consultant urologist with the form. He underwent a departmental assessment over the telephone on 12 July 2022. The Healthcare Professional (HCP) who spoke to him was of the view that he had insufficient restrictions in the activities being considered within Schedule 6 to the Universal Credit Regulations (Northern Ireland) 2016 (the 2016 regulations) and made a report (the UC85) to that effect.
13. On 25 July 2022 the decision maker made the determination that the appellant did not have LCW. Following the mandatory decision process, the original decision was maintained. An appeal was lodged on 25 November 2022, and it was heard on 31 May 2023. The tribunal dismissed the appeal.

The applicable legislation

14. There is no dispute before me that the tribunal was applying the correct test to establish whether the appellant had LCW. That is a determination of LCW under regulation 40 applying Schedule 6 of the 2016 regulations, which provides a series of activities under which points are scored dependent on the ability, inability or level of difficulty a claimant has in carrying out the activity. A minimum score of 15 points is required to satisfy the test and be found to have LCW. Whilst there are other legislative routes to that conclusion, they did not form part of the tribunal's considerations, and I need not set them out at this stage.

THE ARGUMENTS OF THE PARTIES

The appellant

15. The application to the Commissioners has identified areas in which it is said that the tribunal fell into error of law. I hope I do the appellant no disservice if I summarise them thus: the tribunal based its decision on information that was too limited in relation to his abilities to walk and stand; his account to the tribunal had described his deteriorating condition, but that was unfairly seen as his having given inconsistent, even untruthful evidence as to his abilities and difficulties; he was not able to fully explain himself, as the tribunal wanted yes or no answers, and he was unable to provide any context to his account. He felt coerced into giving answers that were suited to a predetermined outcome.

The respondent

16. In his submission Mr Rush argues that the tribunal decision was based upon its assessment of the appellant's credibility, and there are numerous binding decisions that it is a matter wholly for the tribunal to determine whether a witness is being truthful or not. Further, it isn't necessary for the tribunal to give a detailed explanation of why it came to a view that an appellant was not persuasive, or even untruthful, and what is said here is therefore sufficient. He illustrates that point with extracts from the Record of Proceedings (ROP) saying that the tribunal considered all the evidence before it, including the appellant's testimony that his condition (and thus his abilities) varied. It was entitled to come to the view that it did on the evidence given. Accordingly, he says, no error of law is shown.

Discussion

17. Looking at the tribunal's statement of reasons, it is hard for me to discount some of the points the appellant makes.
18. Moreover, in the short paragraph that I understand comprises the written reasons of the tribunal I can ascertain no real findings of fact as to what the appellant can do within the disputed descriptors that form the legal test for whether the appellant has LCW. It is, at lowest, good practice to set

these out: *R (I) 4/02 and R 2/01 (IB)*, a decision of a Tribunal of Commissioners in Northern Ireland.

19. Instead, following a brief recitation of what the appellant said at the hearing a general comment is made that “the tribunal was unable to accept that his ability to mobilise by moving around, standing and sitting and going up stairs is significantly compromised most of the time to the extent that he would be unable to perform these tasks safely and unaided”.
20. The basis of the dismissal of the appeal does appear to be a credibility issue. It is said: “The evidence contained in the appellant’s claim form in relation to standing namely that he is ok (*sic*) conflicts with the appellant’s evidence at hearing during which he indicated that he was not comfortable standing”. However, the evidence used to justify this does not pass scrutiny.
21. There is little to persuade me that the tribunal’s reliance on what is said to be the inconsistency in relation to standing was fair. The basis for the tribunal’s view is that he said it was not a problem in the UC50, but described some problems in answer to questions at the hearing. The evidence from the UC50, however, is more nuanced than the tribunal state.
22. At question 13 the appellant writes, “If my testicle swells really bad which happens fairly regularly, I don’t stand up much and stay horizontal as much as possible”. This is in part 2 of the form, which assesses mental cognitive and intellectual capabilities, and it is clarified as part of the medical examination by the HCP that the problems are only physical. Nonetheless, that this was said in the UC50 negates the tribunal’s only reason for their decision, the stated inconsistency on the issue of standing.
23. This is the mainstay of the tribunal’s refusal to accept that the appellant had any problems with the descriptors: it is not sustainable.
24. The appellant says he was describing a deteriorating condition, and that was treated as his being inconsistent. Where matters are relied upon in the reasons, such as the appellant having been told that he needed to explain his problems as of the date of the decision under appeal, I would expect some reference to this having been raised during the hearing, with something in the note or the reasons to the effect that his understanding of that was established. The note of the hearing doesn’t assist me; although it is not expected to be a *verbatim* account this note is, in my experience, particularly sparse.
25. The further reason set out is that the appellant did not challenge the HCP’s report of his typical day. On my examination of TAS file as well as the Commissioners’ file, there is no specific indication that the appellant did agree with the ‘typical day’ report; but even if he had, it is hard to see that his agreeing he can shower, dress and cook a meal (whilst being cautious about any difficulties in standing to do so), affect the need to assess those descriptors which are clearly disputed, namely mobilising and standing and

sitting. It seems to me that it is implicit in the very act of appealing that there are disagreements with the conclusions of the HCP report, where they are adopted by the departmental decision maker.

26. Further, in the note of the evidence there seems to be an undercurrent of concern that the appellant was not pursuing more treatment for his problem; however, the UC50 makes it clear that what is envisaged is “an intervention” that he describes as “embolization treatment” and his evidence was that he still awaited this. The new tribunal may need to clarify the position, if it sees this as relevant.

The error of law here

27. The reasons provided by the Chair of the tribunal are so brief as to be, in my judgment, inadequate to explain to the appellant why his account of pain on walking and if standing or sitting for a period is not accepted, particularly in view of the medical evidence that he provided. Both the descriptors that were in issue, mobilising and standing and sitting, required a finding as to what the appellant’s abilities were, bearing in mind the critical aspect ‘to avoid significant discomfort’. This necessitated findings as to the level of discomfort the appellant experienced, in what circumstances, whether he needed to take certain action to avoid significant discomfort, and if so, over what walking distance or time sitting or standing. Only when those matters were established could the tribunal take a view as to his capability within the legal tests. I pause to observe for the benefit of the new tribunal that under the statutory test the ability to mobilise *with* significant discomfort should be disregarded: *GL v Secretary of State for Work and Pensions* (ESA) [2015] UKUT 503 (AAC).
28. I accept the points Mr Rush makes as to it being the task of the tribunal to decide on whether a witness is credible, and there is indeed considerable case law to the effect that the tribunal need not explain its conclusions on that issue in great detail; however, what is said needs to have a rational basis, and internal and external consistency with other aspects of the evidence.
29. My reading of the report of the Consultant Urologist, to whom complaint of scrotal pain was also made, is that it is consistent with the finding on ultrasound examination of a left sided varicocele within the scrotum. That doctor says “I suspect that the varicocele is the cause if the left sided scrotal pain”.
30. It isn’t clear to me from the reasons to what extent, if any, the tribunal accepted that the appellant suffered pain; if it did not, that required some explanation in view of that medical evidence. The concern that the appellant was not pursuing more treatment, also demanded the context of why that affected the tribunal’s judgment, and the evidence to support it.

My conclusions

31. The statement of reasons in this case is insufficient to convey to the appellant why he lost. There is no effective fact finding, and although I accept that significant reasoning of a credibility finding is not required, there needs to be some explanation in a case where the medical evidence from a specialist in the field appears to support the contention of pain. The tribunal needed to explain what it found about the appellant's pain, if any, and if he had none, what it made of the consultant's letter. In the circumstances of this case more explanation was required as to why the appellant's account was not accepted.

Before the new tribunal

32. The next tribunal will look at the evidence afresh and make its own findings of fact as to the appellant's likely difficulties and capability in relation to the disputed descriptors. Those findings will be based upon its analysis of what it reads and hears: the tribunal might be helped by a maxim from my colleague Upper Tribunal Judge Jacobs, in his capacity as the learned author of the book 'Tribunals Practice and Procedure' where he describes a fact as what you get when you apply a process of reasoning to the evidence.
33. As always, I caution the claimant that success before me on a point of law is no indication of what the result will be at the fresh tribunal, which is examining the facts.



(Signed): P Gray

Deputy Commissioner NI

19 June 2024