

**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 20 December 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 BE/6064/20/05/U.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I refer the appeal to a newly constituted tribunal for determination.

**REASONS**

**Background**

3. The appellant had been awarded universal credit (UC) to the Department for Communities (the Department) from 10 December 2018. On 27 March 2022 the appellant returned a UC50 questionnaire to the Department answering questions about his capacity to perform certain activities. A copy of this UC50 cannot now be located by the Department. The appellant attended a medical examination with a healthcare professional (HCP) on 25 May 2022 and the Department received a copy of the HCP's report. On 2 September 2022 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, submitting further information. The decision was reconsidered by the Department but not revised. The respondent appealed.

4. The appeal was considered on 20 December 2023 by a tribunal consisting of a legally qualified member (LQM) sitting with a medical member. The tribunal disallowed the appeal. The appellant made an application that was treated as an application for setting aside. The LQM refused the application and directed that it should be treated as a request for a statement of reasons for the tribunal's decision and this was issued on 30 April 2024. The appellant applied to the LQM of tribunal for leave to appeal to the Social Security Commissioner. The LQM refused the application by a determination issued on 21 May 2024. On 10 June 2024 the appellant applied to a Social Security Commissioner for leave to appeal.

### **Grounds**

5. The appellant submits that the tribunal has erred in law on the basis that he experiences pain and had not been able to afford to attend the hearing of his appeal.
6. 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 erred in law and indicated that the Department supported the application.

### **The tribunal's decision**

7. The LQM of the tribunal has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary evidence before it consisting of a Departmental submission, which contained a UC85 medical report form prepared by the HCP following a consultation with the appellant by telephone. from the appellant's general practitioner (GP). Reference was made in the submission to a UC50 self-assessment questionnaire that it accepted had been returned by the appellant, but which could not now be found by the Department. Reference was also made to a UC113 report which it was said had not been returned by the appellant's GP. The tribunal had sight of the appellant's medical records and correspondence. I observe that among the medical records is a UC113 report that was completed by the appellant's GP on 4 May 2022. An older UC85 HCP report dated 2018 was also included in the papers before the tribunal, which was erroneously referred to as a UC50 in the index to the Department's submission.
8. The tribunal had received consent from the appellant to it proceeding in his absence. It duly considered the appeal on the basis of the documentary evidence. It observed that the Department was unable to provide the copy of the UC50 that the appellant had completed. On the basis of the evidence before it, the tribunal awarded no points on the limited capability for work assessment and disallowed the appeal.

## Relevant legislation

9. 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.

...

10. 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.

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

### **Assessment**

12. 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.
13. 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.
14. 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.
15. The appellant's grounds tend to challenge the merits of the decision. Mr Rush for the Department correctly submits that an appeal on question of law should not be permitted to become a re-hearing or further assessment of the evidence, when that assessment has already been fully and thoroughly undertaken. He does not support the grounds submitted by the appellant, and I agree with him that there are no merits in the appellant's grounds.
16. However, he raises a further submission in the appellant's interests around the issue of the missing UC50 questionnaire. Mr Rush points out that the UC50 was available to the decision maker and to the HCP when assessing the appellant, but not to the tribunal when it heard the appeal. He indicates that he is troubled by aspects of the tribunal's findings, being concerned that some of these are derived from evidence dating back to 2018. In the light of the Department's support, I consider that I should grant leave to appeal.
17. I observe that the LQM refused the appellant's setting aside application on the basis that none of the conditions in regulation 57 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 were met. That is not so. By regulation 57(1)(a) it is a ground for setting aside that a document relating to the proceedings in which the decision was made was not sent to or was not received at an appropriate time by a party to the proceedings or the party's representative or was not received at an appropriate time by the person who made the decision. "The person who made the decision" is a reference to the tribunal and "an appropriate time" would be before it made its decision.

18. In this case, it appears to me that an untoward circumstance arises. Evidence in the form of a UC50 was before the decision maker in the Department but was mislaid and was not then put before the tribunal hearing the appeal. This is precisely the sort of situation that I would envisage as falling under the ambit of regulation 57(1(a)). On top of this, there appears to be an element of confusion as to whether a UC113 report from the appellant's GP was considered by the Department. Whereas the Department's submission states that this was not received, and therefore not taken into account, there is a copy of the UC113 in the GP records.
19. As a matter of law, I do not have any formal supervisory jurisdiction over the application of regulation 57 by the LQM. However, it has been established that there is an overlap between the setting aside jurisdiction and the principles of procedural fairness that do fall within my jurisdiction (see for example former Chief Commissioner Martin in C18/02-03(IB) or my own decision in *PMcK v Department for Social Development* [2014] NI Com 3).
20. Again, there is no formal procedural requirement that a UC50 should be placed before a tribunal. However, it seems to me that, having completed a UC50 questionnaire - which would represent the appellant's own words describing his physical or mental limitations - the appellant would have a legitimate expectation that this would not be mislaid by the Department, but would be placed before the tribunal. I consider that this is particularly important in a case where the tribunal is proceeding in the absence of an appellant and therefore does not have the benefit of his oral evidence. The situation might be remedied by the tribunal giving a further opportunity to attend, or where this is not realistically likely to occur, by directing a new UC50 to be obtained by the Department. However, that did not happen in the present case.
21. It appears to me that by proceeding in the absence of a UC50 in all the circumstances of the present case the tribunal has introduced an element of unfairness into the proceedings. To establish unfairness, it does not have to be established that the outcome of the appeal was materially affected. It is sufficient that this omission was capable of affecting the outcome of the proceedings, and it seems to me that it was.
22. I consider that I should allow the appeal. 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

19 August 2024