

Bulletin 176

Esther

THE SOCIAL SECURITY COMMISSIONERS

Commissioner's Case No: CSI/744/02

SOCIAL SECURITY ACT 1998

APPEAL FROM THE APPEAL TRIBUNAL UPON A QUESTION OF LAW

COMMISSIONER: D J MAY QC

Oral Hearing

Appellant:

Respondent: Secretary of State

Tribunal: Glasgow

Tribunal Case No: U/05/095/1999/01962

DETERMINATION AND DECISION OF SOCIAL SECURITY COMMISSIONER

1. The claimant has applied to the Commissioner for leave to appeal on a question of law from the decision of an appeal tribunal dated 11 July 2001. Having considered the application and heard parties, I grant leave to appeal. The parties consented that in the event I granted the application for leave that I could treat and determine the application as an appeal. This I do. My decision is that the decision of the tribunal given at Glasgow on 11 July 2001 is not erroneous upon a point of law. The appeal fails. I dismiss it.

2. This case came before me for an oral hearing on 23 January 2003. The claimant was represented by Mr Orr, a Welfare Rights Officer of the City of Glasgow Council. The Secretary of State was represented by Miss Stirling, Advocate, instructed by Mr Crilley, Solicitor of the Office of the Solicitor to the Advocate General.

3. The application for leave to appeal was against a decision of the tribunal which was in the following terms:-

“The decision of the Secretary of State is not confirmed.

From 3 March 1999 there is a loss of faculty identified as follows: impaired right ankle function resulting in the disablement from the relevant accident.

The extent of the disablement resulting from the loss of faculty is to be assessed at 14% for the period from 3 March 1999 to 31 January 2000 and at 10% for the period from 1 February 2000 to 31 December 2002.

This is a final assessment.”

4. There was an issue raised by Miss Stirling before me as to whether the application for leave to appeal to the chairman was late and whether in these circumstances I required to exercise a discretion as to whether to admit the application under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations 1999. However a perusal of the papers indicated that the chairman had accepted the late appeal and determined the application by refusal on that basis. Upon consideration of what was said by Mr Commissioner Turnbull in CIB/479/2001 in paragraph 13 Mr Stirling did not persist with argument on that issue.

5. In presenting his grounds for appeal, Mr Orr departed from the grounds for appeal which had been set out in writing. He advanced a wholly new ground of appeal. That ground was that in assessing the claimant's disablement, the tribunal should have regard to the provisions of regulation 11(8) of the Social Security (General Benefit) Regulations 1982 in the context of Schedule 2 of these regulations. This he said the tribunal had not done. In support of his argument he cited what was said by Mr Commissioner Rowland in paragraph 16 R(I) 5/95 where Mr Rowland said:-

“...I also take the view that a tribunal should indicate to what extent they have had regard to Schedule 2 of the Social Security (General Benefit) Regulations 1982.

.....

The “said Schedule 2” is the Schedule of prescribed degrees of disablement. It does not provide assistance in all cases but the present is the type of case where a tribunal might well

find it useful to consider the Schedule. They might ask themselves whether or not the claimant is more or less disabled than he would have been had he lost, say, one phalanx of a little finger (5%) or the whole of an index finger (14%). Assessments of disablement should be brought into line with those prescribed in the Schedule.”

Mr Orr accepted that this was not an argument which he had advanced before the tribunal. He said that he had made no submission on this point.

6. Miss Stirling's position was that I should refuse to grant leave to appeal on the basis that no arguable error in law had been demonstrated on the part of the tribunal. However it seems to me having regard to the passage from a decision of Mr Commissioner Rowland which I have quoted that the ground is arguable and in these circumstances I grant leave to appeal.

7. The issue then arises as to whether there is any merit in the grounds of appeal. Mr Orr submitted, having regard to the date on which the decision was made, that section 12(8)(a) of the Social Security Act 1998 did not apply. Miss Stirling was not in a position to make submissions on Mr Orr's submission. However she submitted that there was no merit in the grounds of appeal. She submitted that regulation 11(8) was simply permissive and that in the exercise of the judgement the tribunal required to apply in making the assessment of disability they had not acted in a way which no reasonable tribunal would have acted. Mr Orr's point was a narrow one and he did not seek to suggest that the other errors identified in paragraph 16 or R(I) 5/95 applied in this case.

8. I do not think there is any merit in the appeal. As Mr Commissioner Rowland said in R(I) 5/95 the assessment of disablement is largely a matter of judgement. The tribunal have set out full reasons as to how they exercised that judgement in this case. I accept what Miss Stirling says in relation to the regulation 11(8) of the general benefit regulations being permissive. The claimant was represented by Mr Orr before the tribunal. They were entitled to accept that Mr Orr knew the case which he wished to make before the tribunal. Mr Orr did not rely in his submissions to the tribunal on the exercise set out in regulation 11(8) as being appropriate and something to which the tribunal should have regard in making their assessment. I consider that Mr Commissioner Rowland pitches the position too high when he says that a tribunal should indicate to what extent they have had regard to Schedule 2 of the Social Security (General Benefit) Regulations 1982. He himself concedes later in paragraph 16 that consideration of the schedule does not provide assistance in all cases. I do not see how it can be said that in a case such as the present where the issue was not raised before them and where the claimant was represented by an experienced representative that it can be said that they were bound to make such an indication, particularly when the regulations are permissive in their terms. I am also inclined to accept Miss Stirling's submission to me that it is doubtful whether the Schedule would have assisted the tribunal in this case standing the nature of the disablement suffered by the claimant and the terms of the Schedule in which the comparison would require to be made.

9. The appeal fails.

(Signed)
D J MAY QC
Commissioner
Date: 28 January 2003