WH-v-Department for Communities (PIP) [2019] NICom 30

Decision No: C6/19-20(PIP)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 29 May 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 29 May 2018 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

2. I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. An appeal tribunal which has a Medically Qualified Panel Member is best placed to assess medical evidence and address medical issues arising in an appeal. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.

3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.

4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his entitlement to Personal Independence Payment (PIP) remains to be determined by another appeal tribunal. In accordance with the guidance set out below,

the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

Background

5. On 15 September 2017 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 31 July 2017. Following a request to that effect, and the receipt of additional medical evidence, the decision dated 15 September 2017 was reconsidered on 30 November 2017 but was not changed. An appeal against the decision dated 15 September 2017 was received in the Department on 19 December 2017.

6. The appeal tribunal hearing took place on 29 May 2018. The appellant was present. There was a Departmental Presenting officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 15 September 2017. The appeal tribunal did apply descriptors from Part 2 of Schedule 2 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations') which the decision maker had not applied. The score for these descriptors were insufficient for an award of entitlement to the daily living component of PIP at the standard rate – see article 83 of the Welfare Reform (Northern Ireland) Order 2015 and regulation 5 of the 2016 Regulations.

7. On 20 September 2018 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 18 October 2018 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 25 October 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 20 November 2018 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 3 December 2018, Mr Hinton, for DMS, supported the application for leave to appeal on certain of the grounds advanced on behalf of the appellant. Written observations were shared with the appellant on 3 December 2018. Written observations in response were received from the appellant on 14 December 2018 and were shared with Mr Hinton on 18 December 2018.

9. On 16 April 2019 I granted leave to appeal. When granting leave to appeal I gave, as a reason, that certain the grounds of appeal, as set out in the application for leave to appeal, were arguable. On the same date I determined that an oral hearing of the appeal would not be required.

Errors of law

10. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?

11. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

> "(i) making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters');
>
> (ii) failing to give reasons or any adequate reasons for findings on material matters;
>
> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
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> (iv) giving weight to immaterial matters;
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> (v) making a material misdirection of law on any material matter;
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> (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …
>
> Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

Analysis

12. In the application for leave to appeal the appellant has, *inter alia*, challenged the appeal tribunal's assessment of certain of the medical evidence which was before it and the appeal tribunal's conclusions with respect to planning and following a journey. In his comprehensive written observations on these issues, Mr Hinton made the following submissions:

> 'Whilst I accept that the tribunal made itself aware of the aforementioned evidence and commented on it I would have concerns on how it has reached its conclusions regarding the issue of seizures. At a later stage in its reasoning the tribunal accepted that whilst (the appellant) had *"some issues in respect of his sight and he had epilepsy, the seizures did not occur regularly".* Consequently, it would appear the tribunal in assessing

this evidence concluded that (the appellant) did not fulfil entitlement because these seizures were not occurring the majority of the time. If the tribunal adopted this approach then I would contend it has applied the wrong legislative test. The tribunal's thinking in this respect should have concentrated on whether there was a real possibility of harm occurring and the severity of the harm even though the harmful event which triggered the risk occurred less than 50% of the time. This approach has been adopted in a GB Commissioner's decision, *RJ, GMcL and CS v Secretary of State for Work and Pensions [2017] AACR32.* Paragraphs 55 and 56 stated:

> *",,, if, for the majority of days a claimant is unable to carry out an activity safely or requires supervision to do , then the relevant descriptor applies. On a correct analysis, as we have determined, that may be so even though the harmful event or the event which triggers the risk actually occurs on less than 50 per cent of the days.*
>
> *In conclusion, the meaning of "safely" in regulation 4(2A) and as defined in regulation 4(4) is apparent when one considers the legislation as a whole and with the assistance of the approach by the House of Lords to the likelihood of harm in the context of protecting people against future harm. An assessment that an activity cannot be carried out safely does not require that the occurrence of harm is "more likely than not". In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm occurring and the severity of the consequences are relevant. The same approach applies to the assessment of a need for supervision".*

The equivalent NI regulations are Regulation 4(3) and 4(5) of the Personal Independence Regulations (NI) 2016.

I would also refer to (the appellant's) evidence submitted at the hearing when he stated:

"Seizures

Would know they are coming on sometimes
I would know what's happening
Mostly don't know what's happening"

The above statement is at odds with (the appellant's) evidence to the Disability Assessor when he stated that he knows when a seizure is coming as he "has an aura" and then tries to get himself into a safe position. However, on perusing the statement of reasons I would contend the tribunal has failed to resolve the conflict in this evidence. Furthermore, as (the appellant) stated at the hearing that he mostly didn't know what was happening when he experienced a seizure I would contend the onus was on the tribunal to explore in greater detail the approach laid down in paragraphs 55 and 56 of the aforementioned decision with regards to this issue. Its failure to do this renders its decision erroneous in law.

…

I now turn to the activity of planning and following a journey. In his evidence contained within his self-assessment form, (the appellant) stated that he would walk into people and objects when out of doors and because of his epilepsy would have "no confidence going anywhere strange on his own". In his evidence at the tribunal hearing (the appellant) stated:

"Can find my way into town and could go to down town if I have to".

The tribunal in its reasoning referred to the above statement and then concluded as follows:

"The tribunal took the view that whilst he had some issues in respect of his sight and he had epilepsy, the seizures did not occur regularly. Medication appears effective and they agreed with the panel that he could follow and plan the route of a journey unaided…"

In issue 1 above I contended the tribunal had erred in law because of its approach to dealing with frequency of seizures. I pointed out that the tribunal's approach to this issue was to consider the real possibility of harm occurring even though this might occur on less than 50% of the days, along with the severity of the harm. I would

> contend that with regards to the activity of planning and following a journey the tribunal was obliged to consider (the appellant's) seizures in this context. Its failure to do this renders its decision erroneous in law.
>
> I would also contend the tribunal needed to explore more fully (the appellant's) statement that he could find his way into town. This would appear to take the nature of a familiar journey and I accept this does not preclude the scoring of points if assistance is required here. In his self-assessment form (the appellant) stated that he did not require help from another person to plan and follow a route to somewhere he knew well. This would appear to me to relate to his journey to work every day in Coleraine and his statement that he "could find his way into town". However, he stated he sometimes needed help getting to somewhere he did not know well. I see no evidence in the tribunal papers where the panel questioned (the appellant) regarding unfamiliar journeys. Consequently this might have led to possible entitlement in respect of this activity had the tribunal explored this area in some detail with (the appellant). Its reasoning is therefore inadequate in this area, rendering its decision erroneous in law.'

13. I am not sure that I agree with Mr Hinton's submission that the appeal tribunal was obliged to resolve the conflict in the appellant's evidence concerning the degree to which the appellant was aware that a seizure was pending or was happening. The more important point which Mr Hinton makes, however, is the extent to which the appeal tribunal's approach to the possibility of harm occurring and the degree of that harm was in keeping with the principles set out by a Three-Judge Panel of the Administrative Appeals Chamber of the Upper Tribunal *RJ, GMcL and CS v Secretary of State for Work and Pensions (PIP)* ([2017] AACR 32 (*'RJ'*)). In *AG-v-Department for Communities (PIP)* ([2018] NICom 51, *C2/18-19(PIP)*), after setting out the relevant legislative provisions and reviewing the detail of the decision in *RJ*, I said the following, in paragraph 18:

> 'The decision in *RJ* is a decision of a Three-Judge Panel of the Upper Tribunal. It has been reported in the reported decisions of the Administrative Appeals Chamber of the Upper Tribunal. I agree with the careful and detailed analysis undertaken by the Three-Judge Panel including the acceptance of the further analysis undertaken by the different Three-Judge Panel in *MH*. I accept that the principles are equally applicable to the equivalent legislative provisions in Northern Ireland i.e. regulations 4(3), 4(5) and 7 of the 2016 Regulations and

how those provisions apply to Schedule 1 to the 2016 Regulations.'

14. The reference to *MH* is a reference to a decision of a different Three-Judge Panel in *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC). The reference to the 2016 regulations to the Personal Independence Payment Regulations (Northern Ireland) 2016.

15. Applying the principles in *RJ* and *MH* to the instant case, it is clear that the decision of the appeal tribunal is in error in how it has applied regulations 4(3) and (5) and 7 of the 2016 Regulations. I set aside the decision of the appeal tribunal but with a degree of reluctance given its careful consideration of the other issues arising in the appeal. In this regard, I would note that I would not have allowed the appeal on the basis of the other grounds of appeal advanced by the appellant.

Disposal

16. The decision of the appeal tribunal dated 29 May 2018 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

17. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:

    (i) the decision under appeal is a decision of the Department dated 15 September 2017 in which a decision maker of the Department decided that the appellant was not entitled to PIP from and including 31 July 2017;

    (ii) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and

    (iii) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed): K Mullan

Chief Commissioner

18 June 2019