AC-v-Department for Communities (PIP) [2019] NICom 32

Decision No: C8/17-18(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 12 April 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 12 April 2017 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. For further reasons set out below, 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 her 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 5 September 2016 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 28 June 2016. The decision dated 5 September 2016 was reconsidered on 14 September 2016 but was not changed. An appeal against the decision dated 5 September 2016 was received in the Department on 10 October 2016.

6. The appeal tribunal hearing took place on 12 April 2017. The appellant was present and was represented by Ms Williams of the Citizens Advice organisation. There was a Departmental Presenting Office present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 5 September 2016. The appeal tribunal did apply descriptors from Parts 2 and 3 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations') which the decision maker had not applied. The score for these descriptors was insufficient for an award of entitlement to either the daily living component or the mobility 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 21 July 2017 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). On 26 July 2017 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 7 August 2017 a further application for leave to appeal was received in the Office of the Social Security Commissioners. The appellant was, once again, represented in the application by Ms Williams. On 25 August 2017 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 14 September 2017, Mr Culbert, for DMS, conceded that there was an error in the decision of the appeal tribunal but did not accept that the error was material. Written observations were shared with the appellant and Ms Williams on 15 September 2017.

9. On 17 May 2018 I granted leave to appeal. When granting leave to appeal I gave as a reason that certain of the grounds raised in the application for leave to appeal were arguable. Following further administrative action, on 19 February 2019 I directed an oral hearing of the appeal. In advance of the oral hearing a further submission was received from Mr Williams who was now representing the Department.

10. The oral hearing took place on 2 April 2019. The appellant was present and was represented by Ms Williams. The Department was represented by Mr Williams. Gratitude is extended to both representatives for their detailed and constructive observations, comments and suggestions.

Errors of law

11. 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?

12. 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');
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> (ii) failing to give reasons or any adequate reasons for findings on material matters;
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> (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."

The submissions of the parties

13. In the application for leave to appeal, Ms Williams made the following submission on behalf of the appellant:

> 'We feel there was an error of law on the following grounds:
>
> - Not considering Activity1E for needing assistance to complete the preparation of a main meal

- Not considering activity 4E for needing to use an aid (pads) for continence
- Not considering Activity 6D for dressing/undressing lower body
- Not considering Activity 1D for undertaking unfamiliar journeys'

14. In his initial written observations on the application, Mr Culbert made the following submissions in response:

'**My Comments**

Entitlement to Personal Independence Payment is based on whether a claimant has limited or severely limited ability to carry out daily living and/or mobility activities. The daily living and mobility activities are prescribed and can be found at schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016. Each activity has a number of descriptors which attract points, the claimant is awarded points based on which descriptor best describes the claimant's ability to carry out that activity. A claimant will be assessed as having limited ability to carry out daily living or mobility activities if the sum of the points awarded for either component amounts to 8 points, this will result in an award of the relevant component at the standard rate of Personal Independence Payment. A claimant will be assessed as having severely limited ability to carry out daily living or mobility activities if the sum of the points awarded for either component amounts to 12 points, this will result in an award of the relevant component at the enhanced rate of Personal Independence Payment.

I submit that when considering which descriptor best describes a claimant's ability to carry out an activity it is best practise to consider all descriptors in the activity before deciding which one applies therefore it follows that when a descriptor is selected the other descriptors that were not selected had been considered. When a tribunal has explained its reasons for selecting a certain descriptor I would submit that it would be impractical and unnecessary to explicitly comment on each descriptor provided it explains the reasons for choosing the descriptor it did.

In the tribunal's reasons for decision, in relation to daily living activity 1, it is explained that:

'The tribunal accepted that an award of points was merited in respect of preparing

food and the tribunal decided that she could not cook a simple meal using a conventional cooker but was able to do so using a microwave. The tribunal noted the difficulties claimed with reference to cooking on a conventional cooker but the tribunal did not believe that there was any impediment to the Appellant using a microwave in so cooking.'

In relation to daily living activity 6 the tribunal stated:

'The tribunal did not believe that an award of points was merited in the activity of dressing and undressing. The tribunal noted she was able to manage the purchase of clothing at work by use of her hands and use of the till. The tribunal did not accept that for most of the time as regards dressing and undressing she needed assistance to be able to dress or undress her lower body or upper body. The tribunal believed that the appellant could do this in her own time albeit slowly.'

In relation to mobility activity 1, or activity 11, the tribunal stated:

'The tribunal did not believe there was any difficulty at all in planning and following journeys. The tribunal believed that the appellant did not suffer from any cognitive impairment. At the medical examination on 15 August 2016 there was no evidence therein of any intellectual deficit or thought disorder. There was nothing in the records to suggest she had any impairment of cognitive ability. The tribunal noted as previously indicated that the appellant was still able to work 2 days per week in Marks & Spencers dealing with customers working at the till and dealing with purchases. She was able to drive her motor vehicle on those occasions to and from work which was a distance of between 8 and 10 miles. Generally and in view of all of the evidence in the case the tribunal did not believe that there was any difficulty in respect of the appellant planning and following journeys.

In view of the above I submit that the tribunal has given detailed reasons as to why it selected the descriptors it did for three of the activities disputed by (the appellant's) representative. In relation to daily living activity 4 the tribunal stated:

> *'In relation to the activity of washing and bathing again the tribunal accepted that she needed assistance to be able to get in and out of a bath or shower given the weakness associated with her diagnosis and particularly on the left side as recorded in the General Practitioner records…'*

In the summary of the tribunal's decision on the daily living component it has indicated that descriptor d was selected for activity 4, awarding 2 points. Descriptor d is selected if a claimant needs assistance to be able to wash either their hair or body below the waist while descriptor e, which is what (the appellant's) representative contends the tribunal did not consider, is selected if a claimant needs assistance to be able to get in or out of a bath or shower and attracts 3 points. From reading the tribunal's reasons for decision it appears to me the intention was to select descriptor e and award 3 points for activity 4.

…

While the tribunal appears to have made an error in selecting descriptor d and awarding 2 points when the statement of reasons suggest it meant to select descriptor e and award 3 points for activity 4 the question is, is this a material error? I would submit that the extra point would have brought (the appellant's) total points for daily living activities to 5 and therefore would not have reached the threshold for any award of Personal Independence Payment and as such I submit that the tribunal's error is not a material error in law.'

15. In the further submission, received on 27 March 2019, Mr Williams set out the following:

> 'Having perused the papers in preparation for (the appellant's) oral hearing next week, I would like to resile on the original observations. I would now contend that the tribunal has erred in respect of Activity 1, Preparing Food.

As I have outlined in my conclusion however, I would submit that this error alone would have no overall effect on the tribunal's decision.

I have noted from the tribunal's statement of reasons:

> *'The tribunal accepted that an award of points was merited in respect of preparing food and the tribunal decided that she could not cook a simple meal using a conventional cooker but was able to do so using a microwave. The tribunal noted the difficulties claimed with reference to cooking on a conventional cooker but the tribunal did not believe that there was any impediment to the Appellant using a microwave in so cooking.'*

In paragraph 8 of AI v Secretary of State for Work and Pensions (PIP): [2016] UKUT 322 (AAC) Judge Mesher considered the awarding of 2 points under descriptor 1.c.:

> *"Considering again the logical progression of the descriptors, that appears to mean whether the claimant is able to do that without prompting, supervision or assistance, on their own. If the answer to that is that the claimant cannot do so, then descriptor 1(c) is satisfied if the claimant can do so using a microwave, i.e. cook a meal of that sort, again without prompting, supervision or assistance. However, in such circumstances before the points awarded are limited to two it would have to be asked whether a higher-scoring descriptor might apply. That would be the case if the claimant could not prepare food at all or could only prepare a simple meal from fresh ingredients with supervision or assistance."*

Having decided that 1.c. was appropriate in (the appellant's) case the tribunal has clearly accepted that she has difficulties with this activity, and I would contend that it has failed to demonstrate that it considered whether a higher descriptor was appropriate.

I would also point out that had the tribunal decided that (the appellant) required help or supervision with preparing or cooking a simple meal then (the appellant) would have

> scored 4 points for this activity, rather than the 2 points that she was awarded. This increase would still not have entitled her to an award of the daily living component of Personal Independence Payment.'

16. At the oral hearing of the both representatives expanded on their written submissions.

Analysis

17. I am of the view that Mr Williams was correct to concede that the decision of the appeal tribunal is in error on the basis of the manner in which it approached the potential applicability of Activity 1 in Part 2 of Schedule 1 to the 2016 Regulations. The decision of Upper Tribunal Mesher in *AI v Secretary of State for Work and Pensions (PIP)* ('*AI*') is an important one – see the commentary in paragraph 4.239 of Volume 1 of *Social Security Legislation 2018/2019*. I adopt and accept the reasoning and analysis of Judge Mesher in *AI* which, in my view, properly reflects the law in Northern Ireland. I also agree that the approach taken by the appeal tribunal to the potential application of Activity 1 is not in keeping with those outlined by Judge Mesher. I return to the materiality of the error below.

18. I also agree with the concession made by the Department, made by Mr Culbert in his written observations on the application for leave to appeal, that the decision of the appeal tribunal is in error of law in how it has reached its conclusions with respect to the appropriate descriptor to be applied in respect of Activity 4. To repeat what was acknowledged by Mr Culbert, the decision of the appeal tribunal to apply descriptor 4(d) is perverse given the appeal tribunal's findings of fact. Once again, I return to the materiality of the error below.

19. I turn to the conclusions of the appeal tribunal with respect to the potential applicability of Activity 6. As noted in the written observations on the application for leave to appeal, the appeal tribunal's conclusions with respect to Activity 6 were as follows:

> 'The tribunal did not believe that an award of points was merited in the activity of dressing and undressing. The tribunal noted she was able to manage the purchase of clothing at work by use of her hands and use of the till. The tribunal did not accept that for most of the time as regards dressing and undressing she needed assistance to be able to dress or undress her lower body or upper body. The tribunal believed that the appellant could do this in her own time albeit slowly.'

20. The appeal tribunal has placed a strong emphasis on the fact that the appellant worked. The rules of entitlement to PIP have no specific connection to work in that participation in full or part-time employment

does not prohibit entitlement to PIP. Indeed it is the case that there are many claimants to PIP who have a valid and legal entitlement, satisfying the legislative rules of entitlement, and, who are also working. It is the case that there is nothing at all inherently wrong with an adjudicating authority, including an appeal tribunal, who seek to rely on evidence of working, including specific activities associated with a particular form of employment, as support for a conclusion that a particular activity or descriptor does not apply to a claimant. If such an approach is taken, however, there is, in my view, a duty to undertake a thorough assessment of the work-related activities and what, precisely, those activities entailed. I do not accept that the appeal tribunal, in the instant case, has not explored the work-related activities in sufficient depth.

21. I am also of the view that the findings of fact which the appeal tribunal made in respect of Activity 4 could have an equal applicability to Activity 6. In respect of Activity 4 the appeal tribunal:

> '… accepted that she needed assistance to be able to get in and out of the bath or shower given the weakness associated with her diagnosis and particularly on the left side as recorded in the General Practitioner records.'

22. To repeat, I cannot see how the accepted limitation in respect of Activity 4 could not apply equally to Activity 6. Further there was additional evidence before the appeal tribunal and noted by the appeal tribunal in the record of proceedings for the oral hearing that supported a claim to problems with dressing and undressing. This was in the form of an extract from the appellant's General Practitioner records dated 20 September 2016. I have not ignored that the date of the decision under appeal was 5 September 2016. The additional evidence from the GP records does, therefore, post-date that decision. It seems to me, however, that it is sufficiently proximate to the decision under appeal to permit the appeal tribunal to take it into account – see *R(DLA) 2/01*.

23. Finally, I do not accept that the decision of the appeal tribunal was in error in how it addressed the potential applicability of Activity 5.

24. I turn to the materiality of the errors which have been identified. As was noted above, Mr Culbert, in the original written observations, and Mr Williams, in his subsequent submission, while conceding that errors were made did not agree that those errors were material. That was because of a further assertion that the choice of a more appropriate descriptor for Activities 1 and 4 would not take the appellant above the threshold for entitlement to the standard rate of the daily living component of PIP. That submission on materiality involves a degree of conjecture, albeit natural conjecture, and designed to assist, on what the appropriate descriptor might be. It seems to me that it is more appropriate to allow an expert fact-finding body – another appeal tribunal to undertake the necessary exercise. It is equally important to note that I have found the

approach of the appeal tribunal to the potential applicability of a third Activity – 6 – to also be problematic.

Disposal

25. The decision of the appeal tribunal dated 12 April 2017 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.

26. 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 5 September 2016, which decided that the applicant was not entitled to PIP from and including 28 June 2016;
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> (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
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> (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

26 June 2019