SJ-v-Department for Communities (PIP) [2019] NICom 44

Decision No: C33/18-19(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 January 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 12 January 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 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 4 March 2017 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 25 October 2016. Following a request to that effect the decision dated 4 March 2017 was reconsidered on 31 March 2017 but was not changed. An appeal against the decision dated 4 March 2017 was received in the Department of 25 April 2017.

6. Following an earlier postponement, the substantive appeal tribunal hearing took place on 12 January 2018. The appellant was present, was accompanied by her husband and was represented. The Department was represented by a Departmental Presenting Officer. The appeal tribunal allowed the appeal in part making an award of entitlement to the standard rate of the mobility component of PIP for a fixed-term period from 5 April 2017 to 4 April 2020 but confirming a lack of entitlement to the daily living component of PIP from and including 5 April 2017.

7. On 25 July 2018 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 6 August 2018 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 11 September 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. The appellant was represented in this application by Mr McCloskey of the Law Centre (Northern Ireland). On 27 September 2018 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 19 October 2018, Mr Williams, for DMS, supported the application on one of the grounds advanced on behalf of the appellant. Written observations were shared with the appellant and Mr McCloskey on 19 October 2018.

9. On 10 December 2018 I accepted the late application for special reasons. On 13 March 2019 I granted leave to appeal. When granting leave to appeal I gave, as a reason, that it was arguable that the appeal tribunal has erred in the manner in which it has approached the potential applicability of activity 5 in Part 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 and the interpretive provisions in regulation 2(1) of the same Regulations. 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;
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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;
>
> (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, Mr McCloskey made the following submission on behalf of the appellant:

> 'The tribunal appear to accept the oral evidence of use of pads to manage incontinence but do not award points due to her ability to manage her own incontinence. It was a material error not to award points for descriptor 5(b) and this would have led to an award of the daily living component. The use of pads to manage toileting needs amounts to the use of an aid and therefore based on the unchallenged and undisputed evidence that the appellant

requires pads to manage her incontinence it was an error of law not to award an additional 2 points.'

13. Mr McCloskey cited three decisions of the Administrative Appeals Chamber of the Upper Tribunal in support of this submission - *SSWP v NH (PIP)* [2017] UKUT 258 (AA), *BS v SSWP (PIP)* [2016] UKUT 0456 (AAC) and *KO v SSWP (PIP)* [2018] UKUT 78 (AAC).

14. In his written observations on the application for leave to appeal Mr Williams made the following submission in response to this ground of appeal:

> 'I should start by stating that I concur that the tribunal has erred in respect of this issue.
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> I have noted the following extracts from the tribunal's record of proceedings:
>
> > *"Toileting: has IBS. She is incontinent. She can change the pads herself. Uses pads all the time…….She can change her incontinence pads……..No referrals regarding her incontinence pads…….No referrals regarding her continence. A bit of both bladder and bowel incontinence. More leakage from her bowel. Has to go to the toilet quickly. Has had accidents. No referrals to a continence nurse. Finds it hard to talk about continence problems."*
>
> In its statement of reasons the tribunal has recorded:
>
> > *"(The appellant) indicates this morning that even though she is incontinent she can manage to change her own pads…….We cannot overlook her statement to the DA that she can manage her own toileting needs and note she confirms today that she can and does deal with her own incontinence. No claims were made about needing help on or off the toilet. We noted the OT did not provide her with toileting needs."*
>
> Mr McCloskey contends that the tribunal has erred by not selecting descriptor b. for Activity 5, "Managing toilet needs or incontinence" i.e. "Needs to use an aid or appliance to be able to manage toilet needs or incontinence." As Mr McCloskey has alluded to, the tribunal does not appear to have disputed or doubted (the

appellant's) claim to use pads to manage her incontinence. If it is accepted that (the appellant) needs to use pads in respect of her incontinence then the question would be whether the use of incontinence pads constitutes an "aid or appliance"?

The interpretation of an "aid or appliance" is provided in Regulation 2 of The Personal Independence Payment Regulations (Northern Ireland) 2016 as follows:

> *"(a) means any device which improves, provides or replaces C's impaired physical or mental function;"*

As Mr McCloskey has identified, there have been a number of GB decisions considering Activity 5, "Managing Toilet Needs", and the use of incontinence pads as an aid. I would agree with the argument put forward by Mr McCloskey and consider that he has demonstrated that an incontinence pad should be considered to be an aid.

In GB decision KO v SSWP (PIP) [2018] UKUT 78 (AAC), Judge Rowley summarised some of the principles that have been established in GB case-law in respect of this activity:

> *"5. The following principles have been established in Upper Tribunal cases:*
>
> *(a) Incontinence pads fall within the definition of "an aid or appliance" (BS v SSWP (PIP) [2016] UKUT 456 (AAC).*
>
> *(b) "Descriptor 5b can be satisfied in its terms by a reasonable need to use an aid or appliance on a precautionary basis on many more days than those on which incontinence actually occurs." (SSWP v NH (PIP) [2017] UKUT 258 (AAC)).*
>
> *(c) The "need" must be a reasonable need. Thus, the descriptor may be satisfied even if an aid or appliance is not actually used, so long as it is reasonably needed (MB v SSWP (PIP) [2016] UKUT 250 (AAC)).*
>
> *(d) It is sufficient if a person satisfies a descriptor at some point during a 24 hour period, for a period which is more than trifling and which has some degree of*

impact on him or her (TR v SSWP (PIP) [2015] UKUT 626 (AAC); [2016] AACR 23).”

> If the tribunal accepted that (the appellant) uses pads to manage her incontinence then I would contend that it was obliged to select descriptor 5.b. (The appellant) was awarded 6 points by the tribunal in respect of the daily living activities. As such, the additional 2 points attracted by descriptor 5.b. would bring her points total to eight, entitling her to the standard rate of the daily living component of Personal Independence Payment. I would therefore contend that this is a material error in law.
>
> If the tribunal disputed that (the appellant) requires the use of pads to manage her incontinence, and there is no evidence to indicate that this is the case, then I would consider that it was required to investigate this further. In addition, I would consider that the tribunal would be required to demonstrate in its reasoning that it had considered the use of pads as an aid. I would contend that in failing to adequately demonstrate in its reasoning that it considered the use of pads as an aid that the tribunal erred in law.
>
> I would therefore agree with Mr McCloskey that there is merit in this issue that he has raised.’

15. I accept the submissions which have been made by Mr McCloskey and Mr Williams and for the reasons which have been set out by them agree that the decision of the appeal tribunal is in error of law. I would add that in *CD-v-Department for Communities (PIP)* [2018] NI Com 30 (C5/18-19(PIP)) I endorsed the decision of Upper Tribunal Judge Rowley in *BS v The Secretary of State for Work and Pensions (PIP)*. As was noted above, that decision in turn held that incontinence pads should be considered as an aid or appliance falling within descriptor 5(b).

16. Having found, for the reasons which have been set out above, that the decision of the appeal tribunal is in error of law, I do not have to consider the second ground of appeal. That ground was that the appeal tribunal had not explained why it was limiting the award of entitlement to the standard rate of the mobility component to a period of three years. The proper approach to the period of entitlement of PIP is being considered by a Tribunal of Social Security Commissioners in Northern Ireland in a separate appeal and the relevant principles will be set out in the decision on that appeal. I would observe, in addition, that in the instant case there is no explanation by the appeal tribunal as to why it set the commencement date of the fixed-term period of award of entitlement to the standard rate of the mobility component of PIP at 5 April 2017 when the date of claim was 25 October 2016. I accept that it may be the case that the appeal tribunal was advised that certain of the Personal

Independence Payment (Transitional Provisions) Regulations (NI) 2017 applied.

Disposal

17. The decision of the appeal tribunal dated 12 January 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.

18. 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 4 March 2017 which decided that the appellant was not entitled to either component of PIP from and including 25 October 2016;

    (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

22 July 2019