BR-v-Department for Communities (PIP) [2019] NICom 60

Decision No: C13/19-20(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 9 October 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 9 October 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 22 November 2016 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 26 August 2016. The decision dated 22 November 2016 was reconsidered on 3 January 2017 but was not changed. Following the receipt of further evidence, including medical evidence, an appeal against the decision dated 22 November 2016 was received in the Department on 3 April 2017.

6. The appeal tribunal hearing took place on 9 October 2017. The appellant was present and was represented. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 22 November 2016.

7. On 15 June 2018 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). On 20 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 9 October 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 8 November 2018 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 26 November 2018, Mr Hinton, for DMS, opposed the application on the grounds advanced by the appellant but supported the application on another identified ground. The written observations were shared with the appellant on 26 November 2018.

9. On 10 April 2019 I accepted the late application for special reasons. On 28 May 2019 I granted leave to appeal. When granting leave to appeal I gave as a reason that it was arguable that the appeal tribunal had failed to exercise its inquisitorial role with respect to an issue raised by the appeal. 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;
>
> (iv) giving weight to immaterial matters;
>
> (v) making a material misdirection of law on any material matter;
>
> (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 his written observations on the application for leave to appeal, Mr Hinton made the following submission:

> 'Whilst this issue was not raised specifically by (the appellant) in her grounds of appeal I would contend the tribunal has erred in law by failing to show in its reasoning how it dealt with the activity of moving around.
>
> The tribunal proceedings recorded the following:
>
> > *"…Ms Mackle asked that the Panel consider the following Activities to be in dispute and these were the Activities she would like the Panel to review, managing therapy, washing and bathing, dressing and undressing, engaging with other people face-to-face, planning and following journeys, moving around".*
>
> With regards to her ability to move around, (the appellant) provided the following information at the hearing:

"…I can walk to the different departments in the hospital when I go to the hospital. I am familiar with City Hall – could you walk around it? Yes I could do 75 to 100 metres. That is walking from Burger King to River Island.

I get pain all over my legs. With knees would be difficult. I may have to stop. It is more my left knee which is the difficult one. No-one can say to me what my condition is. I just know that it is pain.

I have also got varicose veins. I have not fallen or hurt my knees. I have no specific medical condition regarding my knees or legs. No-one has told me this. If I stop I can go on again. I would call my sister if I need a lift anywhere. I can go to the shop maybe for about 2 days and I get what I have to get there and then come back. It varies on a day-to-day basis depending on the level of pain I have.

I cannot tell you what the maximum distance I could walk is. I just do not know".

In her self-assessment form completed on 12 September 2016 (the appellant) stated that she could only walk between 20 and 50 metres and also stated "it varies"

In line with the above information provided by (the appellant) I would contend the tribunal had a duty to comment on and assess it in the statement of reasons with regards to the activity of moving around. Furthermore, as (the appellant's) versions of the distance she could walk differs in her self-assessment form and the evidence presented at the hearing I would contend the onus was on the tribunal to resolve this conflict. However, I see no evidence in the tribunal's reasoning that it has addressed (the appellant's) needs in this area or resolved the conflict between the differing versions. The tribunal has certainly made reference to (the appellant's) ability in planning and following a journey (Activity 1 of the mobility activities). However, activity 2 has not been commented upon.

As this activity had been requested to be considered by (the appellant's) representative at the hearing, I would

> contend the onus was on the tribunal to deal with it. The tribunal might very well have decided that based on the evidence before it (the appellant's) physical restrictions were not so debilitating as to merit the scoring of points for this activity. If that was the case, the tribunal should have made that clear in its reasoning. However, its failure to address this activity specifically renders its decision erroneous in law.'

13. I accept Mr Hinton's submission and for the reasons which have been outlined by him agree that the decision of the appeal tribunal is in error of law.

Disposal

14. The decision of the appeal tribunal dated 9 October 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.

15. 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 22 November 2016, in which a decision maker of the Department decided that the appellant was not entitled to PIP from and including 26 August 2016;

    (ii) the Department is directed to provide details of any subsequent claims to PIP and the outcome of any such claims to the appeal tribunal to which the appeal is being referred. The appeal tribunal is directed to take any evidence of subsequent claims to PIP into account in line with the principles set out in *C20/04-05(DLA)*;

    (iii) 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

    (iv) 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

8 October 2019