CC-v-Department for Communities (PIP) [2020] NICom 10

Decision No: C41/19-20(PIP)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 4 June 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Craigavon.

2. An oral hearing of the application has not been requested.

3. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

4. The appellant had previously claimed and been awarded disability living allowance (DLA) at various rates between 2005 and 2017. As her DLA award was due to expire she was invited to claim personal independence payment (PIP) from the Department for Communities (the Department). She duly made a claim by telephone from 15 June 2017 on the basis of needs arising from breast cancer, depression, anxiety and high blood pressure. She was asked to complete a questionnaire to describe the effects of her disability and returned this to the Department on 30 June 2017. She was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 4 September 2017. On 20 September 2017 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 15 June 2017. The appellant requested a reconsideration of the decision, and she was notified that the

decision had been reconsidered by the Department but not revised. She appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 4 June 2018 the tribunal disallowed the appeal in respect of mobility activities, but allowed the appeal in relation to daily living activities, awarding the standard rate of PIP from 25 October 2017 to 28 August 2020. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 21 September 2018. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 6 November 2018. On 8 March 2019 the appellant applied to a Social Security Commissioner for leave to appeal. The application was late. However, on 11 September 2019, the Chief Social Security Commissioner admitted the late application for special reasons.

Grounds

6. The appellant, represented by Mr Black of Law Centre (NI), submitted that the tribunal has erred in law on the basis that it failed to explain why it had not awarded mobility component, despite the appellant enjoying previous awards of DLA mobility component.

7. The Department was invited to make observations on the appellant's grounds. Ms Patterson of Decision Making Services (DMS) responded on behalf of the Department. Ms Patterson submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.

The tribunal's decision

8. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, containing the PIP2 questionnaire completed by the appellant, a consultation report from the HCP, two CBT therapist letters, two supplementary medical reports, DLA related evidence and a reconsideration letter from the Department awarding standard rate daily living component. The tribunal had sight of the appellant's medical records.

9. By a majority decision the tribunal found that the appellant should be awarded 9 points for daily living activities 1, 3, 4, 6 and 9, arising from her mental health. It awarded the standard rate of daily living component. By a unanimous decision, it found that she should be awarded 4 points for mobility activities, arising from her mental health, disallowing mobility component. The tribunal rejected evidence from the appellant in relation to physical problems in mobilising due to severe joint and muscle pain. It found that she used no walking aids, that the medical records indicated no physical difficulty with mobilising, that no physical problem was evident on examination by the HCP and that she reported walking in Tesco and 100 yards to the end of her driveway, stopping once. The tribunal did not accept that the act of moving

around gave the appellant any particular difficulty and found that she could mobilise safely, to an acceptable standard, repeatedly within a reasonable period most of the time for greater than 200 metres. This meant that she could not be awarded points for mobility activity 2. The tribunal accepted that she needed prompting to undertake any journey, awarding 4 points for mobility activity 1.

10. In relation to daily living activities, the tribunal gave a majority decision but did not set out reasons for the minority's view. I observe that this is, procedurally, an error of law. However, as no issue is taken with the award of daily living component I consider that it is not a material error of law in all the circumstances. I further observe that, prior to the tribunal hearing, there had been an "offer of award" by the Department of the standard rate of the daily living component. I will say something about this below.

Relevant legislation

11. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component. These components may be payable to claimants whose ability to carry out daily activities or mobility activities is limited, or severely limited, by their physical or mental condition. The Personal Independence Payment Regulations (NI) 2016 (the 2016 Regulations) set out the detailed requirements for satisfying the above conditions.

12. The 2016 Regulations provide for points to be awarded when a descriptor set out in Schedule 1, Part 2 (daily living activities table) or Schedule 1, Part 3 (mobility activities table) is satisfied. Subject to other conditions of entitlement, in each of the components a claimant who obtains a score of 8 points will be awarded the standard rate of that component, while a clamant who obtains a score of 12 points will be awarded the enhanced rate of that component.

Assessment

13. The appellant, represented by Mr Black of Law Centre (NI), submits that the tribunal has erred in law on the basis that it failed to explain why it had not awarded mobility component, despite the appellant enjoying previous awards of DLA mobility component. He places reliance on the decision of Upper Tribunal Judge Wright in *AW v Secretary of State for Work and Pensions* [2018] UKUT 76.

14. On the adequacy of the tribunal's reasons, Mr Black advances an argument that is essentially the same as that considered by me in the case of *JF v Department for Communities* [2019] NI Com 72. Mr Black appeared for the appellant in that case and his submissions were made prior to a decision being issued by me in *JF v DfC*.

15. Two issues emerged from *AW v SSWP*. These are whether there can properly be an inference that a previous award of disability living allowance (DLA) high rate mobility component means that the claimant at the time of that

award was limited in walking more than 50 metres, and whether the evidence which supported the previous award should be before the tribunal determining a subsequent PIP appeal.

16. In *JF v DfC*, I addressed the question of whether any link existed between previous awards of DLA high rate mobility component and the mobility component of PIP. For the reasons I gave in that decision, I do not accept the proposition that there is a direct link. I held that, in cases where claimants previously enjoyed an award of DLA high rate mobility component, there is not a requirement on tribunals generally to give reasons for finding that descriptors 1(c)-(f) are not satisfied. The conditions of entitlement to PIP mobility component do not neatly equate to the DLA conditions of entitlement. Many claimants who would previously have been awarded DLA at the rate of the high rate mobility component will be excluded from the equivalent PIP rate simply because the conditions of entitlement are different.

17. In *JF v DfC* I referred to the decision of Deputy Commissioner Wikeley in *DC v Department for Communities* [2019] NI Com 24. I agreed with Deputy Commissioner Wikeley's decision in so far as he held that there was no rule of law that necessarily requires a different outcome to be explained as between a DLA claim and a PIP claim, but that it was for the tribunal in the particular circumstances of each case to decide if there was such an apparent inconsistency that reasons were required. However, I also qualified this with reference to the decision of Great Britain Commissioner Howell in *R(M)1/96* concerning the adequacy of reasons. That decision was confined to the requirement to give reasons for DLA renewal decisions which did not maintain the level of a previous award. Commissioner Howell held that that reasons were not required where it is obvious from the findings of the tribunal why it is not renewing a previous award.

18. In this case the previous award of high rate mobility component of DLA from 12 December 2008 to 24 October 2017 appears to have been based on the GP factual report dated 22 December 2008. The appellant's difficulties at that time were reported as breast cancer (March 2005), anxiety, depression, poor sleep, myalgia (muscle pain) and arthralgia (joint pain). The GP had reported that lethargy and myalgia caused difficulties in walking. I understand that myalgia and arthralgia can be a consequence of chemotherapy treatment for cancer, but would be expected to resolve when the therapy ceased. It appears that the appellant's mental health was a significant factor. The GP reported that cognitive behaviour therapy was due to commence.

19. The tribunal has not made reference to the GP factual report of 2008. As this report was almost nine years old by the date of the decision I do not criticise the tribunal for not specifically addressing it. The tribunal had access to the appellant's medical records and considered recent problems and treatment from 2014. In relation to mobility, it addressed the appellant's complaints of severe joint and muscle pain. It noted that she reported the most severe pain in her back, right hip and right knee and found it tiring to walk. However, it found that she used no walking aids. It noted her daily activities including shopping in Tesco or locally. It found that the medical records did not indicate

any particular problem with mobilising. It observed that the HCP did not find any serious restriction upon clinical examination. On the basis of this evidence the tribunal concluded that the appellant could mobilise more than 200 metres and therefore attracted no points for mobility activity 2. I consider that the tribunal's reasons in this case are clear.

20. I accept that the appellant makes out an arguable case of error of law and therefore I grant leave to appeal. However, I do not accept that there is an error of law in the tribunal's decision on the ground that has been argued and I disallow the appeal.

Postscript

21. A curious aspect of this case was the appearance of a letter among the tribunal papers, referred to in the document footer as a "PIP Offer of Award" and dated 19 December 2017. The letter purported to represent an "offer" to the appellant of a PIP award at the standard rate of the daily living component. This "offer" appeared to be conditional on the appellant discontinuing her appeal.

22. In order to understand fully the documents before me in the tribunal file, I directed some questions to the Department about the letter. I asked:

    (i) Since when, and in what circumstances, are such letters of offer issued to claimants?

    (ii) What is the statutory basis for the Department issuing a letter of offer?

    (iii) What adjudication action does the Department take after a claimant signs the letter of offer?

    (iv) What is the statutory basis of such adjudication action?

    (v) What effect does signing the letter of offer have on the continuation of the claimant's appeal?

    (vi) What is the statutory basis of that effect?

23. Ms Patterson responded for the Department. She followed the format of the questions put to the Department and her reply was as follows:

    (i) Since when, and in what circumstances, are such letters of offer issued to claimants?

    This has been Departmental procedure since around 2010 but was formalised as part of the Appeals Reform Project in 2016. Regarding the circumstances where this could apply, this would be if a decision maker felt it was appropriate to award points based on the evidence held, for example if new evidence has been provided by claimant, but the new decision does not give the claimant all that they are asking for. Bearing in mind that the new decision, although more

advantageous to the claimant than that which is being revised, is still not in full agreement with the claimant's wishes in terms of the degree of entitlement, it is correct that such adjudication action is taken only with the consent of the claimant. Revising a decision and lapsing an appeal could be advantageous to the claimant as well as saving the Department appeal costs – it could prevent unnecessary delay and any worry associated with the appeal, as well as providing the claimant with the benefit they are due. Essentially it could be coming to the correct decision more quickly than if the appeal process is seen through.

The Advice for Decision Making Guide holds the following in reference to this:

> *'A5159 Where the appeal is accepted by The Appeals Service, the decision maker can still consider revising the decision under appeal, and the outcome determines whether the appeal lapses. An appeal should be lapsed where the revised decision is to the claimant's advantage.*
>
> *'A5160 The purpose of lapsing an appeal is to prevent unnecessary appeals going ahead. The power to revise is discretionary rather than mandatory, and should not be used in order to prevent an appeal being heard…*
>
> *'A5161 So where a revision would not give the claimant all they are asking for in the appeal, the decision maker may contact the claimant before revising to ask them if they would still want to appeal if the revised decision were made. If the claimant says they would*
>
> *1, still appeal, then the decision would not be revised and the appeal goes ahead with our response including details of the revised decision and that we cannot revise the decision as this would mean the appeal would have to lapse*
>
> ***Or***
>
> *2, be happy with the revised decision, the decision maker would make that revised decision and lapse the appeal. The cliamant would be informed of their appeal rights against the revised decision.*
>
> ***Note**: If the claimant cannot be contacted then the appeal should not be lapsed.*

(ii) What is the statutory basis for the Department issuing a letter of offer?

This is done at the decision maker's discretion. There is no specific statutory basis for this action.

(iii) What adjudication action does the Department take after a claimant signs the letter of offer?

If the claimant accepts the offer, the decision under appeal is revised, the appeal will be lapsed and The Appeals Service will be notified. If the claimant indicates he/she does not wish to accept the offer, or if there is no response to the offer, the appeal will proceed i.e. no adjudication action will take place.

(iv) What is the statutory basis of such adjudication action?

In Reported decision R(IS) 2/08, paragraph 31 holds the following in support of this:

> *'No-one appears to have considered whether the decision of 8 October 2003 caused the appeal against the decision of 2 September 2003 to lapse, but the intuitive view that the appeal continued was, in our view, correct. It is true that section 9(6) of the 1998 Act provides that an appeal lapses if the decision under appeal is revised save where regulations otherwise provide and that regulation 30 of the 1999 Regulations provides that an appeal does not lapse only where the revised decision is not more advantageous than the original decision. It is also true that regulation 30(2)(a) provides that decisions that are more advantageous include those where 'any benefit paid to the appellant is greater or is awarded for a longer period in consequence of the decision made under section 9'. However, where a period before the date of the original decision is in issue and a revision affects only part of that period, it seems to us that there are many circumstances in which it can be appropriate to regard the decision as being more advantageous to the appellant only in respect of that part of the period and not the remainder of the period. This is particularly so where the Secretary of State knows very well that the revision does not deal with the main issue raised by the appeal and that it would be a waste of time to treat the appeal as having lapsed and to require the appellant to start all over again.'*

(v) What effect does signing the letter of offer have on the continuation of the claimant's appeal?

Depending on the claimant's response, the appeal may lapse. The claimant will have the same Mandatory Reconsideration / Appeal rights on the new decision.

(vi) What is the statutory basis of that effect?

The Social Security (NI) Order 1998 Article 10(6) states:

'(6) Except in prescribed circumstances, an appeal against a decision of the Department shall lapse if the decision is revised under this Article before the appeal is determined'.

Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, Regulation 30(1):

*30.—(1) An appeal against a decision of the Department shall not lapse where the decision is revised under Article 18 of the Child Support Order(a) [*is treated as replaced by a decision under Article 13 of the Child Support Order by Article 28F(5) of that Order, or is revised under Article 18 of that Order] or under Article 10 before the appeal is determined and the decision as replaced or revised is not more advantageous to the appellant than the decision before it was replaced or revised.'*

As I had no knowledge of the letter of offer procedure and no awareness of the "Appeals Reform Project", I include this correspondence for the information of others involved in the system of social security adjudication.

Moreover, it appears to me that it is arguable that the conditional nature of the letter of offer may be unlawful. If the Department becomes satisfied that a claimant meets the conditions of entitlement to the daily living component, for example, then it is clearly arguable that it must conduct a revision or supersession to that effect without any conditionality whatsoever, in accordance with the relevant provisions of the Social Security (NI) Order 1998. In this case the tribunal awarded the daily living component at the rate previously "offered" by the Department and therefore no material issue arises. However, in any case, it is difficult to see how the Department could make such an "offer" in relation to a component, and then legitimately proceed to dispute the same component before a tribunal.

(signed): O Stockman

Commissioner

4 February 2020