EO'N-v-Department for Communities [2020] NI Com 29

Decision No: C9/19-20(DLA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

DISABILITY LIVING ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 17 October 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 17 October 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 evidence relevant to the issues arising in the appeal, including one specific item of 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 Disability Living Allowance (DLA) 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 19 November 2014 an appeal tribunal awarded the appellant an entitlement to the higher rate of the mobility component and the lowest rate of the care component of DLA from and including 28 January 2014. On 5 April 2016 a decision maker of the Department superseded the decision dated 19 November 2014 and decided that the appellant was entitled to the lowest rate of the care component of DLA from and including 5 April 2016.

6. An appeal against the decision dated 5 April 2016 was received in the Department on 28 April 2016. On 6 December 2016 an appeal tribunal disallowed the appeal and upheld the decision dated 5 April 2016.

7. The appellant then appealed to the Social Security Commissioner. Having granted leave to appeal, on 24 May 2018, I allowed the appeal and referred the case to a differently constituted appeal tribunal for determination.

8. The further appeal tribunal hearing took place on 17 October 2018. The appellant was present, was accompanied by his wife and was represented by Mr Black of the Law Centre (Northern Ireland). There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 5 April 2016.

9. On 12 June 2019 an application for leave to appeal to the social Security Commissioner was received in the Appeals Service (TAS). The appellant was represented in the application by Mr Black. On 27 June 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

10. On 18 July 2019 a further application for leave to appeal was received in the Office of the Social Security Commissioners. Once again, the appellant was represented in the application by Mr Black. On 16 September 2019 observations on the application were requested from Decision making Services (‘DMS’). In written observations dated 7 October 2019, Mr Arthurs, for DMS, supported the application on certain of the grounds advanced on behalf of the appellant. Written observations were shared with the appellant and Mr Black on 8 October 2019. Further correspondence was received from Mr Black on 18 October 2019 in which he acknowledged the support given to the application by Mr Arthurs.

11. The case became part of my workload on 18 November 2019. On 26 February 2020 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 applied the legislative tests relevant to entitlement to the higher rate of the mobility component of DLA. On the same date I determined that an oral hearing of the appeal would not be required.

Errors of law

12. 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?

13. 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;
>
> (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

14. The first ground of appeal advanced on behalf of the appellant was as follows:

> ‘It is submitted that the tribunal has erred in law by failing to set out an adequate statement of reasons for its decision in relation to the issue of grounds of supersession’

15. As was noted above, the decision under appeal to the appeal tribunal was the Departmental decision of 5 April 2016 a decision maker of the Department superseded the decision of an earlier appeal tribunal dated 19 November 2014 and decided that the appellant was entitled to the lowest rate of the care component of DLA from and including 5 April 2016.

16. In *C12/08-09(DLA)*, at paragraphs 48 to 53, I said the following about the appeal tribunal’s duties with respect to the proper identification of a supersession decision, in appeals relating to DLA:

> ‘48. The appeal tribunal was under a specific duty to determine whether the decision under appeal was correct. As that decision was a supersession decision the duty was to determine whether there were grounds to supersede under regulation 6 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999, as amended.
>
> 49. If the appeal tribunal determined that the decision-maker did not have grounds to supersede the earlier decision then that decision would continue to have effect.
>
> 50. If the appeal tribunal determined that the decision-maker did have grounds to supersede the earlier decision then the appeal tribunal could have gone on to consider entitlement to benefit, in light of the substantive rules for entitlement to DLA.
>
> 51. Finally, the appeal tribunal was under a duty to determine the effective date from which any supersession decision should take effect.
>
> 52. The appeal tribunal’s duty is not only to consider the supersession issue, including grounds, entitlement and effective date, but to make clear that it has done so. It is not sufficient for it to be, as DMS suggests, *implicit* from the appeal tribunal’s documentation that the supersession issue was addressed. That consideration must be *explicit* from the decision notice, the statement of reasons or a combination of both. In the present case, I am of the view that it is not even implicit that consideration was given to the supersession issue.
>
> 53. The consideration of the issues raised by the appeal is expressly a part of the appeal tribunal’s

> inquisitorial role (on which issue see the further comments of the Tribunal of Commissioners in Great Britain in *R(IB) 2/04* at paragraph 32). That would mean that the supersession issue ought to have been addressed, in any event.'

17. The error, as postulated by Mr Black, would arise from a failure to undertake the duty set out in paragraph 52 of *C12/08-09(DLA)*.

18. In the statement of reasons for the appeal tribunal's decision, the appeal tribunal noted, in some degree of detail, the medical evidence which was before it, summarising the contents of various medical reports and entries in the appellant's General Practitioner records. Included within that narrative was the following:

> 'General Practitioner letter of 19 August 2016 for Disability Living Allowance purposes – difficulties walking greater than 50 yards. Falls in the past. Uses stick. Persistent neck/shoulder and knee pain. Admission regarding (non cardiac) chest pain. Deaf one ear. Literacy problems.'

19. The appeal tribunal had also noted that the Department, on 13 January 2016, had received a copy of a General Practitioner 'Factual Report' which had been completed by the appellant's GP on 11 January 2016. I return to the evidence of 11 January 2016 and 19 August 2016 below.

20. In regard to the issue of whether the Department, on 5 April 2016 had grounds to supersede the decision of an earlier appeal tribunal dated 19 November 2014, the appeal tribunal began by observing that it was:

> '… limited to evidence as it affected the Appellant at the relevant date ie 5 April 2016 and it was only evidence relevant at this time that the panel used to make the decision.'

21. There is nothing wrong in law with that observation. Article 13(8)(b) of the Social Security (Northern Ireland) Order 1998 provides –

> '(8) In deciding an appeal under this Article, an appeal tribunal –
>
> > (a)……….
> >
> > (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.'

22. In *C24/03-04(DLA)*, at paragraph 8, the Commissioner approved of the following statement of law set out in paragraph 9 of *R(DLA) 2/01*:

> '… In the case of a claim for a Disability Living Allowance, the jurisdiction {of an Appeal Tribunal} is limited to the inclusive period from the date of claim to the date of the decision under appeal. The only evidence that is relevant is evidence that relates to the period over which the tribunal has jurisdiction. However it is the time to which the evidence relates that is significant, not the date when the evidence was written or given. It does not limit the tribunal to the evidence that was before the officer who made the decision. It does not limit the tribunal to evidence that was in existence at that date. If evidence is written or given after the date of the decision under appeal, the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible. If it relates to a later time it is not admissible.'

23. Accordingly, the appeal tribunal was limited to taking account of evidence that was relative to the period over which it has jurisdiction under Article 13(8)(b).

24. The appeal tribunal then noted that it had before it evidence which post-dated the decision under appeal. The appeal tribunal stated that it had 'recorded' certain of that evidence for different reasons.

25. The first piece of evidence was what was described by the appeal tribunal as '… the reference to right knee pain and x-ray result as we felt it would have been relevant at the appropriate date.' Cross referencing this to the appeal tribunal's general narrative and summary of the evidence which was before it, there is a paragraph which states:

> 'General Practitioner – 2/6/2016 – some pain in right knee generally – refer for x-ray (x-ray subsequently carried out to the right knee where it was found that there was no significant loss of joint space and no gross osteophyte formation seen).'

26. I am satisfied that this is the evidence which post-dated the decision under appeal and which the appeal tribunal 'recorded' and determined that the evidence was relevant to the circumstances pertaining as of the decision under appeal. I have noted that the date of the entry is 2 June 2016.

27. The second piece of evidence which the appeal tribunal thought it 'relevant to record' was what was described as an 'ESP Physiotherapy Report' noting that it was '… set up at the request of the patient with his General Practitioner with a view to the Disability Living Allowance appeal.' The date of the report was noted as September 2017. Despite 'recording' this evidence, the appeal tribunal determined that the conclusions contained in the report '… could only be relevant if

applicable at April 2016 and we did not feel the reference at that time to walking around 10 minutes was applicable to April 2016.'

28. The third piece of evidence which post-dated the decision under appeal and which the appeal tribunal 'recorded' was what was described as an 'advanced practitioner physiotherapist report of August 2018'. The appeal tribunal determined that it should be 'recorded' in order '… that the Appellant could be asked about his present walking.' The context of this was a submission which had been made to the appeal tribunal that the Departmental decision was 'illogical' as '… the Appellant suffered from a degenerative condition and improvement was not really to be expected.' While accepting that a statement in the 'advanced physiotherapist' report that the appellant's walking ability was limited to 200 metres could not be '… used with regard to the appropriate supersession date' the appeal tribunal concluded that it was relevant to the submission concerning the irrationality of the Department's decision based on the degenerative nature of the appellant's condition. The appeal tribunal concluded:

> 'If we accepted the 200 metres was a correct figure given by the Appellant to the physiotherapist it would have indicated that there in fact *was* scope for improvement in his condition and this would have gone against the argument of an illogical decision based on a degenerative condition. The panel believed that the 200 metres was a correct figure given by the Appellant to the physiotherapist in August 2018 and did show that it was possible to improve. We did not use this figure or this evidence as a means to make the decision regarding walking in April 2016.'

29. I note, for the moment, that the appeal tribunal, in arriving at the conclusion that there on 5 April 2016 the Department did had grounds to supersede the decision of the earlier appeal tribunal dated 19 November 2014, relied, in large part, on the evidence contained within a report of a healthcare professional dated 22 January 2016. In relation to its determination that it would not rely on the evidence contained within the 'advanced practitioner physiotherapist' report, to determine the circumstances obtaining at the date of the decision under appeal or the distance of 200 metres as the limitation stated by the appellant, the only observed and accepted finding within the report of the healthcare professional, which the appeal tribunal did accept, of the appellant's walking ability as of the date of the report was that '… there would be a restriction in walking with a likely distance before onset of severe discomfort of 200 metres.' It is somewhat illogical that the accepted finding is not at all inconsistent with the finding in the 'advanced practitioner physiotherapist' report and on which the appeal tribunal stated it would not rely.

30. Turning to the appeal tribunal's conclusions with respect to grounds to supersede, it began with the following positive statement:

> 'It was the panel's decision that the Appellant was not virtually unable to walk as at 5 April 2016 and that there was evidence of a change of circumstances since the date of the Tribunal's decision of 19 November 2014.'

31. Where was the evidence of a change of circumstances to be found? The answer was in (i) the GP Factual Report of 11 January 2016 (ii) the report of the examination conducted by the healthcare professional on 22 January 2016 and (iii) various other sources of evidence contained within the appellant's GP records. In relation to (i), the appeal tribunal:

> '… noted that the General Practitioner Factual report of 11 January 2016 that the General Practitioner referred at paragraph c to "intermittent mobility issues" due to being overweight, out of condition and O/A of the hips and degenerative spine.'

32. The evidence in (iii) included the evidence noted above, and what was described by the appeal tribunal as '… the reference to right knee pain and x-ray result as we felt it would have been relevant at the appropriate date.'

33. Having reviewed all of the evidence at (i), (ii) and (iii), the appeal tribunal was able to conclude:

> 'It was the view of the panel that, whilst restricted in walking, the Appellant was not at 5 April 2016 virtually unable to walk. We believe that the evidence of the General Practitioner Factual Report and more specifically the Examining Medical Practitioner/Health Care professional Report in January 2016 *was* sufficient evidence of a relevant change of circumstances since the decision of 19 November 2014 and that therefore the Department did have grounds, on 5 April 2016, to supersede the decision of 19 November 2014 in respect of the award of High Rate Mobility.'

34. There is a technical but minor and non-material error in the wording of the final sentence of the appeal tribunal's overall conclusion. It has to be remembered that the decision of the earlier appeal tribunal, dated 19 November 2014 was a composite DLA decision awarding entitlement to both components of DLA albeit at different rates. The decision of 5 April 2016 superseded the composite decision of 19 November 2014 on the basis that a ground for supersession had been established namely that a relevant change of circumstances had occurred since the date of the composite decision. Having found that a ground for supersession had been established, the decision maker was permitted to go on to look at

benefit entitlement and decided that the appellant was not entitled to the higher rate of the mobility component from and including 5 April 2016. In summary, it is not possible to supersede one part of a composite DLA decision.

35. I return to the appeal tribunal's management of the evidence from the appellant's GP and, more particularly, the GP 'Factual Report' which had been completed by the appellant's GP on 11 January 2016. As was noted above, the appeal tribunal noted this evidence in the general narrative and summary of the evidence which was before it. The appeal tribunal had also noted a GP letter of 19 August 2016, which, as summarised by the appeal tribunal, contained evidence which was potentially relevant to the appellant's submission that his circumstances had not changed and that he remained virtually unable to walk. The appeal tribunal placed a strong reliance on the GP Factual report as support for its conclusions that there was evidence of a change of circumstances since the date of the appeal tribunal's decision of 19 November 2014.

36. I do not have a copy of the GP letter of 19 August 2016. I do, however, have evidence of its context. In the statement of reasons for the appeal tribunal's decision of 6 December 2016, the following is recorded:

> 'His GP provided a letter dated 19 August 2016 stating the appellant uses a stick and would have difficulty going more than 50 yards. There is reference to persistent neck, shoulder and knee pain because of arthritis. There is also mention of chest pain thought to be non-cardiac. Some deafness was recorded. No care needs were identified.
>
> This report was to supplement an earlier report. At that stage the appellant's award had been reduced. The appellant started complaining about the GP's factual report that had been completed. In the earlier report dated January 2016 the same Dr recorded he only had intermittent mobility issues due to being overweight as well as having osteoarthritis of the hips and spine. No care needs were identified.'

37. The picture which emerges is that the appellant's GP, having been asked by the appellant to qualify the statements which had been made in the Factual Report of 11 January 2016, did so and produced the further letter dated 19 August 2016.

38. There is in the file of papers which is before me an undated lengthy letter from the appellant's GP to the 'DLA Office'. It is annotated by a clerk to the Appeals Service as follows:

> 'HIAT (pm) 4.10.16'

39. My experience of sitting as an LQPM tells me that ‘HIAT’ means ‘handed in at tribunal’. I do not know whether the appellant had another appeal tribunal hearing on 4 October 2016. The more important point is that this letter was in the appeal submission which was before the appeal tribunal with which I am dealing. The GP states the following:

> ‘A factual report was completed on the above individual in Jan 2016, specifically requesting information on 3 areas.
>
> - Learning difficulties
> - Angina
> - High blood pressure
>
> He suffers from other conditions and these were not mentioned for specific comment, however they were listed by me on the form … Other chronic conditions relating to his mobility have been documented in previous forms and information received by the DLA office in the past and one would assume that these have been referenced.
>
> …
>
> There is one area that the wording may have been ambiguous and I think it helpful to clarify this.
>
> Question 6(c)
>
> In relation to the three conditions mentioned it would be generous to suggest that these 3 conditions cause ‘intermittent’ mobility difficulties …
>
> A selection of hospital letters relating to his spinal decompression surgery, nerve root injection, x-ray of hips and details of a trial of intra articular hip steroid injection, were appended to the information forwarded to you department. I feel that the interpretation of the written comment has been taken out of context of the 3 conditions listed for specific information.
>
> I trust this clarifies the situation ie in relation to the 3 conditions listed it would be ‘generous’ to suggest his mobility as ‘intermittent’ because his mobility issues relate to the other conditions, as listed, ie the word intermittent refers to these three conditions only and not all others, which obviously do impact significantly on his degree of mobility.’

40. This correspondence confirms that the GP was proactive in qualifying the comments which he had made in the Factual Report of 11 January 2016 and sought to place those comments in their proper context. If the summary of the further correspondence of 19 August 2016 is correct then it is suggestive that the GP's evidence was that the appellant's mobility was limited. I cannot be certain of that, however, not having seen that letter.

41. The appeal tribunal with which I am dealing made no further reference to the correspondence of 19 August 2016 other than to note it in the general narrative and summary of the evidence which was before it. It has occurred to me that the appeal tribunal may have formed the view that as the letter of 19 August 2016 post-dated the decision under appeal then its contents could not be considered to be relevant to the circumstances obtaining as of the date of the decision under appeal. If that was the case then I fail to understand why it did not make a statement to that effect in line with the parallel statements which, as was noted above, were made in relation to the other evidence which post-dated the decision under appeal. Further, and as again was noted above, the appeal tribunal did take into account other evidence which post-dated the decision under appeal, namely an entry in GP records date 2 June 2016. The report of 19 August 2016 is not that far removed in time from 2 June 2016. In any event, the evidence in the report of 19 August 2016, as confirmed by the further undated letter from the appellant's GP is relevant to the circumstances obtaining as of the date of the decision under appeal as it clarified and contextualised evidence which pre-dated the decision under appeal, namely the Factual Report of 11 January 2016.

42. The appeal tribunal's reliance on the GP Factual Report as support for its conclusions that there was evidence of a change of circumstances since the date of the appeal tribunal's decision of 19 November 2014 and warranting a supersession of that decision was misplaced. For that reason, its decision is in error of law.

43. In his written observations on the application for leave to appeal, Mr Arthurs made the following submission:

> 'Regulation 12(1)(a)(ii) of the Social Security (Disability Living Allowance) Regulations (Northern Ireland) 1992 sets out the test for being unable to or virtually unable to walk and insofar as relevant provides as follows:
>
> > *"12 A person is to be taken to satisfy the conditions mentioned in section 73(1)(a) (unable or virtually unable to walk) only in the following circumstances:*
> >
> > *(ii) his ability to walk out of doors is so limited, as regards the distance over which*

> *or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk, ..*

As can be seen when determining whether a person is virtually unable to walk consideration must be given to the time, distance, speed and manner in which that person can walk. Whilst the Tribunal has accepted that (the appellant) has problems with walking, it only considered the distance that he would walk, without considered the issues of time manner and speed of walking and this I would submit constitutes an error in law.'

44. I agree with those observations. Further, there are other aspects of the appeal tribunal's confirmation of the supersession decision which are problematic. The appeal tribunal, for example, has not addressed the issue of the effective date of supersession and, arguably, has not identified in specific terms what the relevant change of circumstances was. The answers to those questions could be implied from the appeal tribunal's simple confirmation of the supersession decision but were not detailed in specific terms.

Disposal

45. The decision of the appeal tribunal dated 17 October 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.

46. 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 April 2016, which superseded an earlier decision of an appeal tribunal, itself dated 19 November 2014, and which decided that the appellant was entitled to the lowest rate of the care component of DLA from and including 5 April 2016;

    (ii) the Department is directed to provide details of any subsequent claims to DLA 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 DLA 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

2 June 2020