

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

DISABILITY LIVING ALLOWANCE

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 9 May 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. For the reasons I give below, I grant leave to appeal. I allow the appeal under Article 15(8)(b) of the Social Security (NI) Order 1998 and direct that the appeal shall be determined by a newly constituted tribunal.

REASONS

Background

3. The applicant had a previous award of disability living allowance (DLA) at the low rate of the mobility component and middle rate of the care component from 30 March 2012 to 29 September 2015. He was sent a renewal form but did not return it before the expiry of his existing award. He made a claim for DLA from the Department for Social Development (the Department) from 30 September 2015 on the basis of needs arising from chronic depression and bipolar disorder. The Department obtained a report from the applicant’s general practitioner (GP) on 4 November 2015. On 9 November 2015 the Department decided on the basis of all the evidence that the applicant did not satisfy the conditions of entitlement to DLA from and including 30 September 2015. The applicant appealed unsuccessfully to a tribunal, but the decision of the tribunal was set aside by a Social Security Commissioner by the decision

on file C50/17-18(DLA) and referred to a newly constituted tribunal for determination.

4. The appeal was newly considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 9 May 2018 the tribunal allowed the appeal, awarding low rate care component for a fixed period of two years. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 28 November 2018. The applicant 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 31 January 2019. On 28 February 2019 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The applicant submits that the tribunal has erred in law on the basis that it had given inadequate reasons for time limiting its decision and that by time limiting the decision it had unfairly deprived the applicant of a possible supplementary payment of DLA on a claim for personal independence payment (PIP).
6. The Department was invited to make observations on the applicant's grounds. Mr Williams of Decision Making Services (DMS) responded on behalf of the Department. Mr Williams submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.
7. The applicant responded through Mr McCloskey, referring to the decision of Chief Commissioner Mullan in C71/10-11(DLA). He submitted that the tribunal had looked at actual post-decision events in deciding to time-limit its decision, as opposed to taking a prospective view from the position of the date of decision under appeal. He further submitted that whereas the tribunal made an award of low rate care component on the basis of the "significant portion of the day" test, leading to the fixed term award, it had not made findings on the main meal test which might lead it to consider the duration of that aspect of potential entitlement.
8. Mr Williams duly responded. He acknowledged that there was merit in the new matters raised by Mr McCloskey. He accepted that the tribunal had taken post decision circumstances into account, contrary to article 13(8)(b) of the Social Security (NI) Order 1998 and that this would amount to an error of law.

The tribunal's decision

9. 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 claim form and

a factual report from the applicant's GP. It further had sight of the applicant's medical records. It also had the previous tribunal's decision and the Commissioner's decision setting that aside. The tribunal had an AT16 with three pages of extracts from the applicant's medical records. The applicant attended the hearing, represented by Mr Strain. The Department was represented by Mr McKavanagh. The applicant indicated his wish to proceed without the medical records. He gave oral evidence.

10. The tribunal noted that the decision under appeal was made on a renewal claim from 30 September 2015, following a previous award of low rate mobility and middle rate care from March 2012. The tribunal was aware that the applicant had experienced a psychotic episode in 2012, having been hospitalised for 7 weeks and then later on for one month. It was hearing the appeal in May 2018 and commented on the difficulty for the applicant describing how he was in September 2015. It heard that he had stopped seeing a community psychiatric nurse in 2014 and had stopped his medication in 2015. He was living alone and was able to drive into the local village to buy food. The tribunal noted that the GP questionnaire submitted by the applicant's representative indicated that he was able to negotiate his way to and from unfamiliar surroundings without guidance or supervision most of the time.
11. The tribunal found that the applicant's mental health had slowly improved over time. It found that the applicant might have benefitted from attention from another person in connection with bodily functions of washing and dressing, and that he satisfied the conditions of entitlement to the low rate care component on the "significant portion of the day" test, time limiting the award to two years.

Relevant legislation

12. The legislative basis of the care component is found at section 72 of the Social Security Contributions and Benefits Act (NI) 1992. This provides:

72.—(1) Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which—

(a) he is so severely disabled physically or mentally that—

(i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or

(ii) he cannot prepare a cooked main meal for himself if he has the ingredients;

(b) he is so severely disabled physically or mentally that, by day, he requires from another person—

(i) frequent attention throughout the day in connection with his bodily functions; or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(c) he is so severely disabled physically or mentally that, at night,—

(i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or

(ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him.

(2) Subject to the following provisions of this section, a person shall not be entitled to the care component of a disability living allowance unless—

(a) throughout—

(i) period of 3 months immediately preceding the date on which the award of that component would begin; or

(ii) the such other period of 3 months as may be prescribed, he has satisfied or is likely to satisfy one or other of the conditions mentioned in subsection (1)(a) to (c) above; and

(b) he is likely to continue to satisfy one or other of those conditions throughout—

(i) the period of 6 months beginning with that date; or

(ii) (if his death is expected within the period of 6 months beginning with that date) the period so beginning and ending with his death.

13. The legislative basis of the mobility component is section 73 of the same Act. This provides:

73.—(1) Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the relevant age and throughout which—

(a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so;

(ab) he falls within subsection (2) below;

(b) he does not fall within that subsection but does fall within subsection (2) below;_

(c) he falls within subsection (3) below; or

(d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time.

...

Assessment

14. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
15. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
16. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.

17. The applicant, represented by Mr McCloskey of Law Centre (NI) initially submitted that the tribunal has erred in law by time limiting the award to a period before the appeal hearing without clear reasons and that unfairness has resulted as the applicant could not reclaim benefit without a resultant gap in entitlement. He refined his challenge subsequently.
18. He submitted that Article 13(8)(b) of the Social Security (NI) Order 1998 was relevant, noting the tribunal saying for example that “our sense was that the appellant is better now than he was in 2015 so there has been some improvement”. In time limiting the award for two years, when the date of decision was some two and a half years in the past, it does appear that the tribunal has placed weight on its view of the applicant at the date of hearing.
19. I consider that there is merit in this argument, as Mr Williams also concedes. Since Article 13(8)(b) was introduced, tribunals have had to apply the prospective test and the assessment of the duration of awards by using medical and other evidence which might indicate a likely prognosis from the standpoint of the date of decision. They are precluded from looking at the course of actual events from a position of hindsight. This is clearly frustrating and illogical when, as here, the time lag between decision and appeal hearing is one of years. However, that is what the law provides.
20. It does appear that the tribunal addressed the low rate care component on the “significant portion of the day” test when time limiting the award. It appears that it “passed” on whether the main meal test applied, as it had already determined that an award of low rate care was merited. However, that became relevant once the duration of the award came for determination. When time limiting the “significant portion of the day” aspect of the low rate care award, it appears to me that it should have addressed the main meal test and determined whether it would have been satisfied whether for a shorter or a longer duration.
21. I am satisfied, and both of the parties agree, that the decision of the tribunal contains an error of law. I set aside the tribunal’s decision and I refer the appeal to a newly constituted tribunal for determination.
22. This is a second time that the appeal has been referred back to tribunal by a Commissioner. However, I am no better placed to determine this matter than I was the first time. I consider that I must remit the appeal to a newly constituted tribunal, acknowledging the difficulties that tribunal will face in deciding matters on evidence which is now of some vintage.
23. The new tribunal has to determine entitlement anew from the date of claim. If it determines that an award of any component of DLA is appropriate, that tribunal needs to be aware of the effect of Article 13(8)(b) of the Social Security (NI) Order 1998 when assessing the likely duration of the disability needs giving rise to any award. It must address

duration in a hypothetical way, addressing the circumstances as they were before the date of decision, being mindful that the law precludes it from addressing the actual course of events.

(signed): O Stockman

Commissioner

16 June 2020