EO'H-v-Department for Communities (PIP) [2020] NICom 44

Decision No: C43/19-20(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 18 September 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 18 September 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 his 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 25 April 2018 a decision maker of the Department decided that the appellant was entitled to the standard rate of the daily living component of PIP for a fixed period from 30 May 2018 to 25 March 2021 and was not entitled to the mobility component of PIP from and including 30 May 2018. Following a request to that effect, the decision dated 25 April 2018 was reconsidered on 22 May 2018 but was not changed. An appeal against the decision dated 25 April 2018 was received in the Department on 5 June 2018.

6. The appeal tribunal hearing took place on 18 September 2018. The appellant was present and was not represented. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and decided that the appellant was not entitled to either component of PIP without specifying a disallowance date.

7. On 20 February 2019 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 13 March 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 25 July 2019 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 4 September 2019 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 30 September 2019, Ms Patterson, 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 1 October 2019.

9. On 6 November 2019 I accepted the late appeal for special reasons. On 18 February 2020 I granted leave to appeal. I gave as a reason that it was arguable that the appeal tribunal had failed to give adequate reasons for its decision. 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');
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> (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;
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> (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 her carefully prepared written observations on the application for leave to appeal, Ms Patterson made the following submissions:

> 'The Tribunal's reasons for each of its choice of descriptors are quite sparse. Although brevity is not in itself an error, relevant issues must be expressed and any conflicts discussed. Furthermore, I have considered the Tribunal's reasoning for its choice of descriptors in line with Judge Gray's decision SC-v-SSWP (PIP) [2017] UKUT 0317 (AAC). At paragraph 20 she states:
>
> > *'A recitation of the evidence followed by an indication of how many points are awarded is neither a finding of fact nor a reason for the conclusion arrived at. A finding of fact can only result from subjecting the evidence to analysis and reasoning; it is not sufficient to set out the evidence and say that having considered it the tribunal was satisfied that*

> *the terms of a particular descriptor was met; the 'because' element is lacking. That element should explain what the tribunal accepted or rejected and why.'*

I will address the Tribunal's treatment of each activity where the Department had awarded points, but which the Tribunal had scored (the appellant) 0 points:

Preparing Meals:

The Record of Proceedings states:

> *'The appellant said he could make cereal or tea. He said he could not stand to cook. He said he had poor concentration and was forgetful. He said he put stuff in the oven a year ago and forgot about it. He said he now uses the microwave. He has a seat in the kitchen. He said family and friends provide meals. He can make toast and cereal. He said the back pain prevents him cooking. He said he is trying to eat healthily. He has reduced weight from 23 stone to 19 stone. He is still eating less. He used to snack on 12 packets of crisps, fizzy drinks and alcohol.'*

Statement of Reasons:

> *'Preparing food: can prepare a simple meal unaided (0 points). The appellant can make toast and cereal and use a microwave. Medically there does not appear to be any evidence which would prevent him cooking.'*

The decision maker for the Department had awarded (the appellant) two points in this activity, finding that 1(b) applied – *'needs to use an aid or appliance to be able to either prepare or cook a simple meal.'*

In his PIP2 form (the appellant) indicated he sometimes needs an aid or appliance, and would sometimes require help. He noted that he has discomfort standing for periods due to back pain, that chopping food is difficult due to hand pain, and that he would consequently usually have readymade meals made by his family, or take away. At assessment, similarly he reported difficult standing for more than 5 minutes and that he would reheat ready prepared meals for himself. I would contend that the

tribunal should have explained further why a higher scoring descriptor did not apply. (The appellant's) account that he has difficulty standing for more than 5 minutes and that he has a seat in the kitchen, as well as the Disability Assessor's medical opinion at assessment would suggest that descriptor 1(b) could apply – that he would need to use an aid (in this case a chair or perching stool) in order to be able to either prepare or cook a simple meal. I would contend that the Tribunal's reasons are insufficient here. In its inquisitorial role, the Tribunal could have queried how often he would require an aid or assistance. This is in accordance with Regulation 4(3) of the PIP Regulations, which provide that a claimant is to be assessed as satisfying a descriptor only if he/she can do so safely, to an acceptable standard, repeatedly and within a reasonable time period. It is possible that an award of 2 points could be appropriate here.

Managing Toilet Needs:

The Record of proceedings states:

> *'…he says he uses the handrail to get to sit down and get off the toilet. It was put to him that he did not tick this on the form (client questionnaire.) He said he has filled in a lot of forms recently. He was asked whether when he was in the pub he could go to the toilet. He said alcohol gives you a sense of security. He uses the handicapped toilet in the pub which has a rail.'*

The Statement of Reasons includes:

> *'can manage toilet needs or incontinence unaided; (0 points). The appellant can use a toilet unaided as he does in the pub.'*

In his PIP2 form (the appellant) had indicated no limitations in this activity. At assessment, the Disability Assessor advised that descriptor 5(b) applied – needs to use an aid or appliance to be able to manage toilet needs or incontinence. Functional history included that he uses the surrounds fixtures to transfer on and off the toilet due to back pain. The musculoskeletal examination included findings of pain and restriction in spinal movements, with pain reported on lower limb movements. I would contend that the Tribunal's findings that (the appellant) has no limitation in this activity is illogical. The reason the Tribunal gave for this choice of descriptor was that (the

appellant) can use a toilet unaided in the pub, however his statement was that he can use the handicapped toilet in the pub, which has a rail. I do not feel the Tribunal gave adequate reasons for removing the Department's award of points in this activity. This alone would not constitute a material error in law, as it could attract an award of 2 points only.

Dressing and undressing

The Record of Proceedings states:

> *'He said he has no problems and uses easy slip on clothes. He says it is difficult putting on socks and tying shoelaces, but he can do it.'*

Statement of Reasons:

> *'Dressing and Undressing: can dress and undress unaided; (0 points). He said he wore easy clothes and had some difficulties with socks and shoes but could manage.'*

In his PIP2 form, (the appellant) stated he needs and aid / appliance sometimes, and that he sometimes needs help especially with putting on socks and shoes due to back pain. At assessment the Disability Assessor advised that descriptor 6(b) was applicable – needs to use an aid or appliance to be able to dress or undress. In his functional history, (the appellant) had reported that he has difficulty putting on footwear and trousers due to back pain, and wears the same clothing often for 2 or 3 days, changing if it becomes soiled. Musculoskeletal examination included pain and restriction in bending but normal upper limb function and sufficient grip. I would contend that the Tribunal gave sparse explanation here. (The appellant) had reported he sometimes needs an aid or appliance, and sometimes requires help. Again, the Tribunal could have queried how often he would require an aid or assistance, in consideration of Regulation 4(3) of the PIP Regulations. On balance, given the previous award of points and the medical opinion of the Disability Assessor that (the appellant) has difficulty in this area due to back pain, I would contend that the Tribunal's reasons are insufficient.

In the activities discussed above, the Tribunal indicates which descriptor it is choosing and includes a reason for that choice. It does not go on to subject the evidence to

analysis nor to consider whether any higher scoring descriptor could apply. Consequently I would contend that the Tribunal erred in law, due to failing to give sufficient reasons for its choices of descriptor in several activities, and it is possible that this could be a material error.'

13. I agree with Ms Patterson's analysis and for the reasons which she has set out agree that the decision of the appeal tribunal is in error of law.

14. Ms Patterson has observed that the reasons for the appeal tribunal's decision are brief. I have stated many times in the past that there is no link between brevity of reasons and lack of adequacy of reasons. The conclusions of an appeal tribunal can be explained in a succinct and brief manner provided those reasons are logical, coherent and are not perverse. In the instant case, there are sufficient elements of disjointedness and incongruity to the appeal tribunal's reasons to call their adequacy into doubt. While each case will depend on its individual circumstances, the requirement for the reasons of an appeal tribunal to be sufficient is enhanced when the decision of the tribunal is to remove an entitlement to benefit awarded by the Department.

15. Having found that the decision of the appeal tribunal is in error of law, I do not have to consider the appellant's grounds for appealing. I would ask the appellant to note, however, that I would not have found the decision of the appeal tribunal to be in error on the basis of the grounds advanced by him. In particular, the appellant should observe that there was no error in the manner in which the appeal tribunal addressed the issue of its powers with respect to the appellant's existing entitlement to PIP and the appellant's options in light of those powers.

Disposal

16. The decision of the appeal tribunal dated 18 September 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.

17. 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 25 April 2018 a decision maker of the Department decided that the appellant was entitled to the standard rate of the daily living component of PIP for a fixed period from 30 May 2018 to 25 March 2021 and was not entitled to the mobility component of PIP from and including 30 May 2018;

    (ii) the appellant will wish to consider what was said at paragraph 34 of *DP-v-Department for Communities (PIP)* ([2020] NICom 1)

concerning the powers available to the appeal tribunal and the appellant's options in relation to those powers;

(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

1 June 2020