MS-v-Department for Communities (PIP) [2021] NI Com 20

Decision No: C1/21-22(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 19 August 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference BM/168/19/03/D.

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

3. This has the consequence that the appellant is no longer entitled to the mobility component of PIP from 28 November 2018 to 27 November 2021, as all issues of entitlement will have to be determined by the new tribunal.

REASONS

Background

4. The appellant had previously been awarded disability living allowance (DLA) from May 2014, most recently at the low rate of the mobility component and the middle rate of the care component. As his award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, he claimed personal independence payment (PIP) from the Department for Communities (the Department) from 14 June 2018 on the basis of needs arising from diabetes, depression, post-traumatic stress disorder, numbness and pain in his face,

restricted neck movements with chronic pain, and restricted thumb, forefinger and wrist movement with chronic pain.

5. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 20 August 2018, submitting further evidence on 17 October 2018. He asked for evidence relating to his previous DLA claim to be considered. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 22 October 2018. On 25 October 2018 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 14 June 2018. The appellant requested a reconsideration of the decision, submitting further evidence. A supplementary medical report was obtained by the Department on 6 December 2018. The appellant was notified that the decision had been reconsidered by the Department but not revised. He appealed, and subsequent to the appeal a GP factual report and a supplementary medical report was received.

6. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal in relation to the daily living component but awarded the mobility component at the standard rate for a three year period. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 27 January 2020. 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 May 2020. On 28 May 2020 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

7. The appellant, represented by Ms Doherty, submitted that the tribunal has erred in law by:

   (i) misinterpreting the law;
   (ii) reaching a decision unsupported by evidence; and
   (iii) failing to take into account material facts.

8. The Department was invited to make observations on the appellant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted that the tribunal had not materially erred in law. He indicated that the Department did not support the application.

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 PIP2 questionnaire completed by the appellant, a psychologist's report dated 17 January 2018, a DLA general practitioner factual report dated 16 February 2016, a consultation report from the HCP, documents on the audit process employed by the Department's medical services agent, a mandatory reconsideration request with a GP letter dated 13 August 2014, a PIP general practitioner factual report, and two supplementary medical reports. The appellant's representative provided a written submission, enclosing a further copy of the psychologist's report, a cognitive behavioural therapist's reports of 2 June 2016, 25 January 2017 and 5 June 2017, letters from a consultant anaesthetist dated 24 July 2018 and 4 October 2018, extracts from the appellant's GP records, a GP letter dated 14 January 2019 and a copy of GB Commissioner's decision CPIP/2377/2015. The appellant attended the hearing and gave oral evidence, accompanied by his wife and represented by Ms Doherty. The Department was represented by Mr Shields.

10. The tribunal noted that the appellant had been injured in a motorcycle accident in 2013 in which he broke his neck and injured his right hand, and that he was suffering from depression and post-traumatic stress disorder (PTSD) since. He also suffered from type 2 diabetes. He was employed as an engineer in the civil service. He complained on face and neck pain and restricted right hand wrist, forefinger and thumb movement due to chronic pain. The Department had accepted an award of 7 points in total for activity 1 (Preparing food), 2 (Taking nutrition), 3 (Managing therapy) and 6 (Dressing/undressing). The tribunal addressed all of the scheduled daily living activities and declined to accept that he should be awarded any points for daily living activities, while similarly disagreeing with the Department, but awarding 8 points, in relation to mobility activities.

11. The tribunal did not accept the appellant's evidence as credible, even taking into account the subjective perception arising from his mental health conditions. While accepting that he may perceive his own evidence to be truthful, the tribunal found that much of it was contradicted by independent evidence. It found inconsistency between his ability to drive a manual car and his stated inability to prepare a main meal due to problems with grip. It found no restriction on taking nutrition. It found his employment responsibilities inconsistent with his stated inability to manage his own medication. It found no restrictions in washing/bathing, managing toilet needs, dressing/undressing, communicating verbally, reading, engaging with people face to face or managing budgeting decisions. The tribunal found that the appellant would have no difficulty planning and following journeys. It did, however, accept that the appellant would experience difficulties repeatedly walking between 20 to 50 metres and awarded 8 points accordingly.

Relevant legislation

12. 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.

13. 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.

14. Additionally, by regulation 4, certain other parameters for the assessment of daily living and mobility activities, as follows:

> **4.**—(1) For the purposes of Article 82(2) and Article 83 or, as the case may be, 84 whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment taking account of relevant medical evidence.
>
> (2) C's ability to carry out an activity is to be assessed—
>
> > (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or
> >
> > (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.
>
> (3) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—
>
> > (a) safely;
> >
> > (b) to an acceptable standard;
> >
> > (c) repeatedly; and
> >
> > (d) within a reasonable time period.

> (4) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.
>
> (5) In this regulation—
>
> "reasonable time period" means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity;
>
> "repeatedly" means as often as the activity being assessed is reasonably required to be completed; and
>
> "safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity.

Submissions

15. On behalf of the appellant, Ms Doherty made submissions in relation to 7 daily living activities and mobility activity 1. These addressed the issue of the use of aids in relation to many of the daily living activities and the tribunal's assessment of the psychological difficulties of the appellant in engaging with other people.

16. The Department had addressed the submissions and submitted in turn that the tribunal had been entitled to arrive at the conclusions it had reached.

Hearing

17. I held an oral hearing of the application. Due to Covid-19 restrictions, the application was held online by way o f Sightlink. Ms Gordon of Community Advice represented the appellant. Mr Killeen of DMS represented the Department. I am grateful to the representatives for their clear and careful submissions.

18. The appellant also attended the hearing. At the outset of the hearing he consented, in the event of leave to appeal being granted, to me treating the application as if it were the appeal.

19. Ms Gordon relied on the written submissions previously advanced with the OSSC1 form. She had submitted further medical evidence and further argument based on the case of *Mongan v Department for Social Development* [2005] NICA 16. The medical evidence had been produced in response to a query that I had raised, due to a reference in the original grounds to a letter from a consultant orthopaedic surgeon which had not then been enclosed. In response to a request for a copy of this letter, Ms

Gordon provided a total of eleven consultant surgeon letters. However, having communicated with the individual who had drafted the original grounds, she was unable to say which of these was referred to in the OSSC1 grounds. In addition, inadvertently, these letters had not been shared with Mr Killeen and I directed that he should be given an opportunity to comment on them.

20. In addition, in the course of the hearing it was observed that there was a discrepancy between the tribunal's statement of reasons and the score sheet indicating the points awarded by the tribunal for the various daily living activities. Whereas the statement of reasons indicated that no points had been awarded for daily living activities, the score sheet indicated an award of 7 points. As this was a computer-printed score sheet, it was possible that human error had been involved. In order to better understand the position, I directed a post-hearing enquiry to the Appeals Service, who forwarded the original handwritten score sheet. This also indicated an award of 7 points for daily living activities.

21. In the light of the discrepancy between the statement of reasons and the score sheet, Mr Killeen submitted that the tribunal's reasons were inadequate. He cited Great Britain Social Security Commissioners' decisions *CCR/3396/2000* and *CIS/2345/2001* and the more recent Upper Tribunal decision in *Secretary of State for Work and Pensions v CO'N (ESA)* [2018] UKUT 80 (AAC).

22. Mr Killeen also commented on the medical evidence which had been shared. He observed that this consisted of 11 medical reports by an orthopaedic surgeon spanning the period from 21 March 2014 to 24 March 2020. Each report detailed the appellant's difficulties with his right hand/wrist, detailing levels of pain, surgeries and other treatments he had received. From reviewing these reports, Mr Killeen accepted that it was evident that these issues had not been resolved around the time of the Department's decision of 25 October 2018.

23. He observed that the tribunal had noted that the last entry regarding the appellant's wrist difficulties in the GP notes and records was dated January 2017. However, he submitted that this was factually incorrect. He noted a reference which implied that the appellant had surgery between December 2017 and November 2018. He noted evidence in the GP notes and in the PIP2 questionnaire to a (then) recent orthopaedic assessment at Musgrave Park with the orthopaedic consultant. He observed that the HCP reported that the appellant had reviews two or three times a year with the orthopaedic consultant. He submitted that the tribunal had not fully investigated this issue. In light of the orthopaedic surgeon's reports, which he had now seen, he accepted that the appellant had a complex history regarding the injury to his hand and had undergone surgery on his thumb in March 2018 and again in March 2019. On the basis that the tribunal had not fully investigated the evidence before it, he submitted that it had erred in law.

24. In short, Mr Killen resiled from the position initially adopted by the Department and no longer opposed the application.

25. Ms Gordon made similar submissions, relying on *RB-v-Department for Communities* [2021] NI Com 5 where I stated at paragraph 21 and 37, in relation to an inconsistency between the decision notice and the statement of reasons, that *"…. the tribunal has not stated reasons for that part of its decision that deals with daily living activities. Failure to give reasons is a sub-category of the requirement of procedural fairness. … On the basis that the tribunal has not given reasons for that part of its decision dealing with the daily living component, I find that it has erred in law*."

26. She further relied on the Great Britain Upper Tribunal case of *LA v SSWP* [2014] UKUT 482, where Upper Tribunal Judge Mitchell referred to the Tribunal's decision notice and statement of reasons at paragraph 12 and stated: "*While there may be two documents involved, there can only ever have been a single reasoning process. Therefore, if the contents of the two documents are inconsistent, the Tribunal will not have given adequate reasons. No one can know exactly what the reasons were*". Judge Mitchell went onto say at paragraph 16 that "…. *the inconsistency…… meant that the Tribunal's reasons for its decisions were inadequate ….The Tribunal's decision must be set aside*."

Assessment

27. 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.

28. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

29. 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.

30. I initially took the view that this was an unusual case for the reason that, although the Department awarded 7 points for daily living activities and 0 points for mobility activities at first instance, the tribunal reached a polar opposite assessment, awarding 0 points for daily living activities and 8 points for mobility. My first thoughts were that, however striking, this simply illustrated that Departmental decision makers and tribunals can arrive at opposite conclusions on the same evidence, where neither conclusion demonstrates irrationality or error of law.

31. However, at hearing, a different scenario emerged. It was observed for the first time that, although the statement of reasons gave the tribunal's justification for awarding no points at all for daily living activities, the computer-printed score sheet had awarded 7 points. It was assumed that this was an administrative error and any original hand-written score sheet was requested to verify the conclusions in the statement of reasons. The hand-written score sheet, however, had also awarded 7 points. It was a record of a unanimous tribunal decision, furthermore, and therefore there was no possibility that a minority view had been recorded in error. The situation was, therefore, that the statement of reasons and the score sheet were mutually inconsistent.

32. In addressing this Mr Killeen cited Great Britain Social Security Commissioners' decisions *CCR/3396/2000* and *CIS/2345/2001* and the more recent Upper Tribunal decision in *Secretary of State for Work and Pensions v CO'N (ESA)* [2018] UKUT 80 (AAC), and Ms Gordon cited my decision in *RB-v-Department for Communities* and Judge Mitchell in *LA v SSWP*. I agree that the propositions expressed in those cases are relevant, and that an unexplained discrepancy between the score sheet and the statement of reasons is liable to render the statement of reasons inadequate.

33. In this case the statement of reasons carefully addressed each daily living activity under a separate heading and in bold text indicated the descriptor chosen and the resulting score. In relation to activities 1, 3, 4 and 6, the statement of reasons indicates that 1.a, 3.a(ii), 4.a and 6.a were chosen, each of which attract 0 points. However, the corresponding score sheet indicates that 1.b, 3.b(ii), 4.b and 6.b were chosen, leading to a total of 7 points. I observe that the award of points on the score sheet is not simply an adoption of the 7 points awarded at first instance by the Department, as the Department had awarded 2 points for activity 2 and none for activity 4. It was therefore arrived at independently and not simply through a process of unconsciously copying the Department's awarded score.

34. One purpose of reasons is to explain how the tribunal has reached the decision it has made. It would appear that on the day of the hearing, which was 19 August 2019, the tribunal awarded 7 points. This is technically the outcome decision reached by the tribunal as notified to the appellant. When giving its reasons on 27 January 2020, however, the tribunal set out an explanation of why it had awarded 0 points. This statement of reasons is incompatible with the outcome decision. Accidental error or administrative error has been ruled out, by verifying what was decided on the date of hearing with reference to the contemporaneous handwritten decision sheet. The statement of reasons is inconsistent with the original decision of the tribunal. It does not explain the tribunal's decision and I find it inadequate for that reason. I grant leave to appeal. I allow the appeal on this ground and I set aside the decision of the appeal tribunal.

Disposal

35. At first instance the Department had assessed the appellant as scoring 7 points for descriptors 1.b, 2.b, 3.b, and 6.b. This appears consistent with evidence that the appellant had restrictions with hand dexterity, grip and strength and wore a prescribed wrist splint. It was accepted that he needed an aid for cooking safely. It was accepted that he would need to use an aid or require assistance to cut up food and take nutrition. It was accepted that the appellant had problems with weakness and pain in his right hand with power and pinch restrictions, and would need to use an aid to manage medication. It was further accepted that by reason of restriction due to neck pain and dexterity he was likely to need to use an aid to dress/undress. Some other activities remained in dispute, but there was some evidence that the appellant also used aids in relation to them.

36. In this context each of the parties submitted that I should determine the appeal on the evidence, under Article 15(8)(a) of the Social Security (NI) Order 1998.

37. However, having given careful consideration to the matter, it does appear to me that some remaining matters of evidence are disputed. As a PIP appeal involves a medically qualified member and a disability qualified member in addition to the LQM, it is better that any disputed matters of evidence are resolved by a fully constituted tribunal. Although the remaining disputed matters are narrow, I nevertheless consider that it is appropriate to refer the matter to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

21 April 2021