RS-v- Department of Communities (PIP) [2021] NICom 4

Decision No: C40/20-21(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 9 October 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 with reference BE/02420/18/03/D.

2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal.

3. I decide the appeal under Article 15(8)(a)(i) of the Social Security (NI) Order 1998 without making further findings of fact.

4. I find that the Department does not establish that the applicant failed to attend a consultation in person without good reason and that it was not required to make a negative determination under regulation 9 of the Social Security (Personal Independence Payment) Regulations (NI) 2016. I allow the applicant's appeal from the Department's decision of 28 February 2018.

REASONS

Background

5. This decision addresses the procedural requirements of regulation 9 of the Personal Independence Payment Regulations (NI) 2016, with particular regard to the evidence that needs to be established before a tribunal can uphold a Departmental decision made under that regulation.

6. The applicant had previously been awarded disability living allowance (DLA) from 7 September 2007, most recently at the high rate of the mobility component and the high 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 was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). He duly claimed from 12 September 2017 on the basis of needs arising from a shoulder injury, neck and back pain, depression and urinary frequency.

7. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 5 October 2017 along with further evidence. He asked for evidence relating to his previous DLA claim to be considered. The Department submits that the applicant was asked to attend a consultation with a healthcare professional (HCP) on 1 December 2017, but did not attend. The Department submits that a further consultation was arranged for 29 January 2018 but was cancelled by telephone. The Department submits that a further consultation was arranged for 13 February 2019, but that the applicant's son cancelled the appointment.

8. As he had not attended the assessment on 13 February 2018 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 12 September 2017. The applicant requested a reconsideration of the decision, submitting further evidence. He was notified that the decision had been reconsidered by the Department but not revised. He appealed, but waived his right to attend an oral hearing of the appeal.

9. 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. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 31 July 2019. 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 17 September 2019. On 24 October 2019 the applicant applied to a Social Security Commissioner for leave to appeal.

10. The application was received after the expiry of the relevant statutory time limit. However, on 19 May 2020 the Chief Social Security Commissioner admitted the late appeal for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

11. The applicant, represented by his son, submits that the tribunal has erred in law, setting out his father's contentions about his medical conditions and disabilities and entitlement to PIP.

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

13. The applicant's son responded, sending further documentary material and Ms Patterson duly replied. The applicant's son in turn responded and subsequently indicated that he was content to rely on the material previously submitted.

The tribunal's decision

14. 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 applicant, evidence relating to his past DLA claim, and material concerning invitations to the applicant to attend consultations with a HCP. The applicant had waived his right to an oral hearing of the appeal but a supporting letter had been received from the applicant's son. The tribunal had access to the applicant's medical records with his consent. The tribunal noted that the issue before it was whether he had good reason for failing to attend a consultation arranged by the Department, referring to failures to attend consultations arranged for 1 December 2017, 29 January 2018 and 13 February 2018, and the decision of the Department that the applicant was not entitled to PIP on the basis that he had failed to attend the final assessment.

15. The tribunal noted that the applicant's son had contacted the Department to indicate that the applicant could not attend due to urge incontinence and neuropathic pain, relying on an undated note from the applicant's GP. It observed that this note probably related to an earlier consultation in October 2015. However, it found the note inconsistent with certain other entries in the applicant's medical records, such as surgery attendances. It observed that the onus to show good reason for not attending an assessment fell on the applicant. It found that good reason had not been established on the evidence.

Relevant legislation

16. 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.

17. 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.

18. In order to assess whether a claimant has limited or severely limited ability to carry out activities, the Department may direct a consultation with a person it approves for that purpose. Regulations 9 and 10 provide for the consultation and the consequences of any failure to attend, as follows:

> 9.—(1) Where it falls to be determined whether C has limited ability or severely limited ability to carry out daily living activities or mobility activities, C may be required to do either or both of the following—
>
> > (a) attend for and participate in a consultation in person;
> >
> > (b) participate in a consultation by telephone.
>
> (2) Subject to paragraph (3), where C fails without good reason to attend for or participate in a consultation referred to in paragraph (1), a negative determination must be made.
>
> (3) Paragraph (2) does not apply unless—
>
> > (a) written notice of the date, time and, where applicable, place for the consultation is sent to C at least 7 days in advance; or
> >
> > (b) C agrees, whether in writing or otherwise, to accept a shorter period of notice of those matters.
>
> (4) In paragraph (3), reference to written notice includes notice sent by electronic communication where C has agreed to accept correspondence in that way and "electronic

communication" has the meaning given in section 4(1) of the Electronic Communications Act (Northern Ireland) 2001.

(5) In this regulation, a reference to consultation is to a consultation with a person approved by the Department.

10. The matters to be taken into account in determining whether C has good reason under regulation … 9(2) include—

(a) C's state of health at the relevant time; and

(b) the nature of any disability that C has.

Assessment

19. 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.

20. 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.

21. 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.

22. However, the Commissioner is not confined to the issues raised by the formal grounds of appeal. Following *Mongan v Department for Social Development* [2005] NICA 16, a Commissioner has a role to identify arguable issues clearly apparent from the evidence, even if they have not been expressly articulated by the appellant.

23. In this application, the applicant is represented by his son. He submitted that the tribunal made a mistake as to a material fact, namely that his father has urge incontinence and experiences neuropathic pain. He described aspects of his father's functional limitations. I mean no disrespect to the applicant's son, but it would appear that he has not understood the question that the Department, the tribunal and – in turn – the Commissioner is addressing. The evidence he has submitted appears to be addressed to his father's prospective entitlement to PIP on the merits, rather than to the more specific question of whether he established good reason for not attending a medical examination.

24. In response to the applicant's submissions, Ms Patterson for the Department submitted that the tribunal took into account all the applicant's medical conditions. It found that he was able to attend his doctor's surgery and that the nature of his disability was not so significant as to prevent him being taken to an assessment at a prearranged time. It noted that the applicant did not request a home visit. She submitted that the tribunal was entitled to find that he had not shown good reason for not attending the medical examination.

25. Further submissions passed back and forth between the applicant's son and Ms Patterson addressed to the factual submissions that he had made. I do not consider that I need to set these out for the reasons I explain below.

Procedural requirements arising from regulation 9

26. This is the first case that I have seen involving regulation 9 of the PIP Regulations. What I have seen gives me some cause for concern about the Department's approach to the presentation of such cases to tribunals. However, I cannot tell if the failings in approach that I identify relate to this case alone or reflect more general practice.

27. Regulation 9 places a requirement on the Department to disallow a claim for PIP where a claimant fails to attend a consultation without good reason. Such regulations have a long history in social security law. Due, no doubt, to the punitive consequences for claimants of failing to attend an examination without good reason, the adjudicating authorities have strictly applied the related procedural requirements that are placed on the Department. Thus, the Great Britain Social Security Commissioner in *R(S)1/64* required adherence to the time limits and necessary content of a notice of examination issued under regulation 10(b) of the National Insurance (Unemployment and Sickness Benefit) Regulations 1948. This approach was carried forward by the Great Britain Commissioner in *R(S)1/87*, applying it to regulation 17(1)(b) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983. The same approach can be seen in the Great Britain Commissioner's decision in *CIB/2221/2005* in relation to decisions under regulation 8 of the Social Security (Incapacity for Work) Regulations 1995 and in my own decision of *TG-v-Department for Communities* [2017] NI Com 68 in relation to a DLA decision under Article 19 of the Social Security Order (NI) 1998.

28. It is unsurprising that the principles followed consistently within the social security regimes established under the 1948, 1975 and 1992 legislation have been carried forward into the modern era. PIP was introduced somewhat earlier in Great Britain than in Northern Ireland. The Great Britain Upper Tribunal judges have already built up a body of case law addressed to regulation 9 in the Great Britain equivalent of the PIP Regulations. The following principles can be observed:

    - *SY v SSWP [2017] UKUT 363*: the tribunal must make a decision on evidence, rather than on the generalised

assertions of a history of non-compliance made by the [Department];

- *MB v SSWP [2018] UKUT 213*: a copy of the relevant appointment letter or of a standard form must be placed before the tribunal by the [Department];

- *IR v SSWP [2019] UKUT 374*: the letter inviting the claimant to an examination must use the language of clear and unambiguous mandatory requirement;

- *PPE v SSWP [2020] UKUT 59*: (an ESA decision on parallel provisions to the effect that) the tribunal file must contain a copy of the letter sent or a standard form and evidence that a letter in that form had been generated by the computer system and dispatched.

29. I find myself in agreement with the decisions of the Upper Tribunal judges in the cases above, which are built on long-standing principles of social security law. I endorse the general principles followed in those cases.

30. Deconstructing regulation 9 and the requirements of case law, it appears to me that certain matters are required to be proved by the Department to the satisfaction of a tribunal before it can determine an appeal such as the present one under regulation 9. These include establishing the fact of sending the claimant written notice of the date, time and place of the consultation (or notice by electronic communication that the claimant had agreed to accept); establishing that it was sent at least 7 days in advance (or if shorter that the claimant consented to this); and establishing that the notice included clear and unambiguous language informing that claimant that attendance was mandatory and that non-attendance would result in disallowance.

31. Observing that the decision under appeal was made by the Department on the basis that "you didn't go to the assessment on 13 February 2018 and we don't think you've given us a good reason for this", I directed Ms Patterson to indicate what evidence before the tribunal on 9 October 2018 established the following matters:

(i) that the applicant had been sent a written notice of the appointment of 13 February 2018 stating the place, date and time of the appointment;

(ii) on what date that written notice of the appointment had been sent;

(iii) what form the written notice of the appointment of 13 February 2018 took;

(iv) whether the language of the written notice indicated that attendance at the appointment of 13 February 2018 was a requirement.

32. I further asked her if the decisions of the Upper Tribunal in *SY v SSWP* [2017] UKUT 363, *MB v SSWP* [2018] UKUT 213 and *IR v SSWP* [2019] UKUT 374 were generally considered to be good law by the Department, or whether these decisions were contested in Northern Ireland.

33. In response, Ms Patterson indicated that the Department considered that the three decisions were good law. She observed that no evidence establishing the matters at (i) to (iv) above had been before the tribunal. She indicated that she had now obtained a copy of the written notice of the appointment that was arranged for 13 February 2018 and enclosed it. It includes the place, date and time of the appointment and was issued by Capita on 29 January 2018. The written notice includes the following wording:

> *'To complete the assessment process, we will need to meet you face-to-face.'*
>
> and:
>
> ***'It is important that you go to this appointment**. If you fail to go without a good reason, the case manager at the Department for Communities is likely to refuse your claim.'*

34. Ms Patterson indicated that it was now her submission that the tribunal erred in law. She accepted that it had failed to satisfy itself of the content of the appointment letter, what the applicant was told, that he fully understood that it was a requirement to attend and the consequences of failure to attend the appointment. She indicated that, in order to comply with the Upper Tribunal judgments, Capita was currently in the process of amending the wording of its appointment letters.

35. I accept Ms Patterson's concession that the Department's submission to the tribunal did not contain any original or specimen copy of a letter requiring the applicant to attend a medical examination. I observe that the wording of the letter now produced does not comply with the requirements of *IR v SSWP*. The submission prepared by the Department was defective for that reason. I grant leave to appeal on that basis. Unfortunately, however, the Department's submission also appears to have confused the tribunal as to what was the proper subject matter of the appeal, and what evidence it needed to consider.

Error in the tribunal's decision

36. In its statement of reasons, the tribunal found that "a further consultation was then arranged to take place on 13 February 2018 and the applicant's son telephoned the Department to cancel the appointment and informed the Department that his father would not be attending this appointment". This is a crucial finding of fact, but it is based entirely on paragraph 9 of the Departmental submission. The submission, as accepted, did not append supporting evidence to establish that a consultation was arranged for 13 February 2018 and on what terms. It did not provide any evidence of content of the telephone call from the applicant's son. Furthermore, no presenting officer had attended the hearing for the Department to address the tribunal on these matters.

37. There may be circumstances where an uncorroborated written submission by the Department might be accepted as establishing some fact on the balance of probabilities. However, a case where a claimant stands to lose benefit entitlement due to failure to comply with formal procedural requirements is not among them. I consider that the tribunal has not based its decision on direct evidence that shows that the procedural requirements of regulation 9 were complied with. It has based its decision on insufficient evidence and has therefore erred in law. I must set aside its decision.

38. This is enough to determine the appeal. However, there is another problematic issue relating to the question of "good reason" and the Department's communication with the applicant. I had further asked Ms Patterson to confirm:

> (v) whether the applicant was written to by the Department after his non-attendance on 13 February 2018 to ascertain his reasons for non-attendance and whether these amounted to "good reason";
>
> (vi) whether any response had been received from the applicant setting out reasons that he said amounted to good reason for non-attendance on 13 February 2018;
>
> (vii) what was stated in that response.

39. She confirmed that the applicant had not been written to by the Department to enquire as to his reasons for non-attendance and whether these amounted to good reason.

40. I observe from the tribunal papers that the Department's general practice is to issue a form called a PIP 6000 to enquire from claimants who have failed to attend a consultation why they did not attend. It is evident from the papers in this case that no PIP 6000 was issued to the applicant after 13 February 2019 to ask why he did not attend.

41. It is axiomatic that a tribunal has an inquisitorial role. The tribunal, rightly or wrongly, had accepted that the applicant had been invited to attend a medical examination, but did not attend. The Department had not enquired as to the applicant's reasons for non-attendance and had not therefore been in a position to place relevant evidence before the tribunal. The applicant did not attend the tribunal hearing. Whereas the applicant's son had sent copious evidence of his father's disability, as indicated above, it appears that he does not grasp the actual legal issues arising in the appeal, but understands it to be a PIP appeal on the merits.

42. The tribunal, in consequence, had no focused evidence before it on the issue of whether the applicant had good reason for not attending on 13 February 2018. It may well be that the onus falls on the claimant to show good reason. Nevertheless, in the absence of evidence, it seems to me that the tribunal would have been obliged to ask directly why the applicant did not attend the medical examination of 13 February 2018, or to direct the Department to do so. However, I do not need to decide that issue conclusively, as I have already determined that the tribunal has erred in law for the reasons I indicated above.

Disposal

43. I set aside the decision of the appeal tribunal.

44. Under Article 15(8)(a)(i) of the Social Security (NI) Order 1998, I make the decision that the tribunal should have made on the evidence before it, without making further findings of fact.

45. I find that the Department does not establish that the applicant failed to attend a consultation in person without good reason and that it was not required to make a negative determination under regulation 9 of the Social Security (Personal Independence Payment) Regulations (NI) 2016. I allow the applicant's appeal from the Department's decision of 28 February 2018.

46. Ms Patterson informs me that no further PIP claim has been made by the applicant. The effect of this, therefore, is that the applicant's PIP claim of 12 September 2017 remains outstanding.

(signed): O Stockman

Commissioner

27 January 2021