SM-v-Department for Communities (PIP) [2021] NICom 6

Decision No: C41/20-21(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 10 June 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 file reference LD/496/19/02/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 under Article 13(8)(b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The applicant was previously awarded disability living allowance (DLA) from 4 January 2012, most recently at the low rate of the mobility component and middle rate of the care component. Her DLA award was set to terminate following legislative changes under the Welfare Reform (NI) Order 2015 and she was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). She duly claimed PIP from 7 September 2016 on the basis of needs arising from depression, anxiety, panic attacks, poor sleeping and addiction recovery.

4. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 10 October 2016. The applicant was asked to attend a consultation with a healthcare

professional (HCP) and a consultation report was received by the Department on 11 November 2016. On 9 January 2017 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 7 September 2016. The applicant requested a reconsideration of the decision. She was notified that the decision had been reconsidered by the Department but not revised. She appealed.

5. An appeal was decided by a tribunal on 22 May 2018, but that decision was later set aside by the LQM. The appeal was subsequently considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member on 10 June 2019. The tribunal allowed the appeal in respect of the daily living component, awarding standard rate for a three year period to 7 February 2020, but disallowed the appeal in respect of mobility component. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 16 September 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 16 December 2019. On 9 January 2020 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The applicant, represented by Mr McGuinness of Advice North West, submits that the tribunal has erred in law on the basis that:

> (i) it failed to consider general practitioner records prior to 2017;
>
> (ii) it did not give proper weight to contemporaneous evidence in the form of employment and support allowance (ESA) evidence submitted by the applicant, affecting daily living activity 9 and mobility activity 1.

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

The tribunal's decision

8. 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 and a PA4 V3 consultation report from the HCP. It had past evidence relating to her DLA claim, and to an employment and support allowance (ESA) claim. It had sight of the applicant's medical records but, from a handwritten endorsement on the

record of proceedings, I understand that it restricted its consideration to a particular period, which I will explain below. The applicant attended the hearing and gave oral evidence, accompanied by her sister and represented by Mr McGuinness, who had prepared a written submission for the tribunal. The Department did not attend.

9. The tribunal allowed the appeal in respect of the daily living component, awarding standard daily living component for three years. It found that the applicant was suffering from depression and recovering from substance dependency. It accepted that she required prompting in respect of daily living activities, awarding 1.d (Preparing food), 4.c (Washing and bathing), 6.c(i) (Dressing and undressing) and 9.b (Engaging with others), awarding 8 points in total. It did not accept that she required assistance with activity 3 (Managing medication) on the basis that she had no cognitive or memory issues, or activity 7 (Communication) as she could make herself understood. In relation to mobility activities, it accepted that she required prompting to plan and follow a journey, awarding 4 points for mobility activity 1.b. It therefore disallowed mobility component.

Relevant legislation

10. 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.

11. 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.

Hearing

12. I held an oral hearing of the application. The applicant was represented by Mr McGuinness of Advice North West. The respondent was represented by Mr Arthurs of DMS. I am grateful to each of the representatives for their submissions.

13. At the outset, Mr McGuinness indicated that he was content, if I decided to grant leave to appeal, to proceed to treat the application hearing as if it was the appeal hearing.

14. Mr McGuinness first submitted that the tribunal had failed to address all the evidence in the form of GP medical records placed before it. He noted that the LQM had amended the tribunal's record of proceedings after he made the application for leave to appeal. Specifically, it had made reference to its consideration of the applicant's medical records from 2017 onwards in the statement of reasons, but, after has submission that the tribunal had not addressed the medical records fully, the date "2017" was amended manually to read "2013". Mr McGuinness submitted that this was a material error and referred to a number of matters from the GP records, which supported the existence of overwhelming psychological distress.

15. When I put to him that this was an instance of correction of an accidental error, rather than an indication that the GP records had been incompletely considered, he submitted that there nevertheless remained doubt about what the tribunal had considered, which undermined confidence in the fairness of the proceedings.

16. Mr McGuinness then referred me to the tribunal's treatment of evidence relating to the applicant's roughly contemporaneous ESA claim that was before the tribunal, submitting that it had not addressed this fully. While acknowledging that it was prepared for another benefit, he submitted that the evidence was nevertheless relevant, and the applicant had asked for it to be considered. He submitted that the supportive evidence in the ESA medical reports was not referenced at all in the statement of reasons. These had referred to severe restrictions and high levels of stress and inability to plan, leading to placement in the ESA support group.

17. In a ground not directly raised in the OSSC1 application, Mr McGuinness further submitted that the tribunal based findings on the manner in which the applicant presented at the hearing. He submitted that this did not reflect her ability to engage with others at the date of decision, which were illustrated by the contemporaneous evidence. He submitted that she was not afforded an opportunity to comment on the tribunal's observation of her appearance. He noted a number of recorded instances of problems dealing with other people due to anxiety. He submitted that the attendance before the tribunal was an artificial situation that did not represent how the applicant would be in daily life.

18. Mr Arthurs generally opposed the application. However, he addressed an issue not raised by Mr McGuinness in the context of the Department's *amicus* role in the proceedings. He observed that there was some inconsistency in the descriptions of the level of dosage of medication prescribed to the applicant by the tribunal and in the earlier tribunal decision that had been set aside.

19. He observed that the drug Cymbalta – also known as duloxetine – was prescribed both for depression and for generalised anxiety. Evidence

was presented that the applicant's dosage was 90mg daily. The tribunal had characterised this as a low dosage, whereas the previous tribunal considered it to be a high dosage. The applicant was being treated for anxiety. While not medically qualified, and recognising that dosage would be conditional on the purpose of the treatment, based on publicly available sources such as the British National Formulary, Mr Arthurs submitted that the tribunal appeared to have mischaracterised the nature of the dosage. Mr Arthurs submitted that this inconsistency placed some doubts over the tribunal's findings and decision.

20. Mr Arthurs submitted that the issue with the amended date on the statement of reasons was merely a correction of an accidental error.

21. He pointed out that ESA was address to capacity for work and work-related activity and was not addressed to the sort of functional limitations that applied in PIP decision-making. Therefore, Mr Arthurs submitted, the ESA evidence did not read across easily into PIP. While the ESA85A appeared to support an inability to perform two sequential actions, the applicant's account of daily living, looking after children independently, whereas it involved habitual actions, did not appear to support this. While evidence indicated generalised anxiety, there was no evidence that established overwhelming psychological distress. He submitted that the factors relevant to the ESA decision making were completely different from those in PIP. Mr Arthurs accepted that there was a lack of reference to the ESA85A, but submitted that no material error of law arose.

22. Mr Arthurs accepted that Mr McGuinness' point regarding the tribunal's reference to how the applicant appeared at the hearing raised an arguable error. He accepted that there was a possibility that the tribunal had misdirected itself by relying on appearance so long after the date of the decision under appeal. However, he submitted that it was not a pivotal finding, but an observation made by the tribunal among other findings. He accepted that the tribunal had not put its findings about how the applicant looked and presented herself at the hearing to her for comment.

Assessment

23. 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.

24. 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.

25. 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.

26. In light of the submissions at hearing, I accept that an arguable case has been established and I grant leave to appeal.

27. Mr McGuinness on behalf of the applicant submitted firstly that the tribunal failed to consider all the evidence before it – specifically, GP notes and records prior to 2017. This was based on the tribunal's reference to the "Documents considered" in the original version of the statement of reasons which referred to "GP records from 2017 onwards". The LQM later manually corrected this to read "2013" instead of "2017".

28. The tribunal's statement of reasons refers to matters of evidence clearly derived from the GP records, when it mentions a referral to the Community Mental Health Team in November 2016. Whereas this is the only reference to a pre-2017 event in the record of proceedings, it nevertheless confirms that the tribunal did not restrict itself to considering the GP records from 2017. I am satisfied that the manual amendment of the year from 2017 to 2013 was simply the correction of an accidental error.

29. While Mr McGuinness accepted this, he submitted that the perception of procedural fairness was nevertheless important. However, I am satisfied that no reasonable observer could believe that the tribunal had not considered the GP records prior to 2017. In addition, with her consent, I have considered the applicant's medical records for the period 2013-2017 and find no compelling evidence in the period 2013-2017 that was not referred to. I reject the appeal on this ground.

30. Mr McGuinness relied on the ESA113 and ESA85A medical reports from November 2016 that had led to the applicant being placed in the ESA "support group". These specifically advised that the applicant had severe restrictions and high levels of stress and inability to plan, in the context of an assessment of whether she had limited capability for work-related activity. Mr McGuinness submitted that this indicated, for example, problems with planning and following a journey. For the Department, Mr Arthurs submitted that the tribunal would not have been able to read this general evidence across into any of the PIP activities or descriptors.

31. Mr McGuinness submitted that the tribunal had not referred to the ESA reports, except where her GP indicated that she was able to travel by taxi, and that it was not possible to confirm that the evidence submitted by the applicant in relation to ESA had been considered more generally, or to understand what weight had been given to it. He relied on Judge Jacobs' decision in *KW v SSWP*, where he said, at paragraph 12:

> "12. … The tribunal had to assess the evidence as a whole. Having done so, the tribunal does not have to refer to every piece of evidence…. It is a matter of judgment how much of that evidence needs to be covered in the First-tier Tribunal's reasons … But it is safe to say this: the tribunal should deal with evidence if the claimant or a representative has specifically relied on it, especially when (as here) the representative had relied on and adopted the carefully expressed approach of Judge Hemingway…"

32. The reference to "the approach of Judge Hemingway" is to the Upper Tribunal decision in *LC v SSWP* [2015] UKUT 32, a disability living allowance (DLA) appeal, where the outcome of an ESA appeal to a different tribunal and related evidence was relied on before a tribunal. Judge Hemingway noted that the DLA tribunal was not bound in any way by the ESA tribunal. However, he observed that the conclusion of the ESA tribunal, to the effect that the appellant was unable to get to a specific place with which she was familiar without being accompanied, could have a bearing on the DLA test for low rate mobility component (which was premised on a requirement for guidance or supervision on unfamiliar routes). He concluded that the tribunal was obliged to address the decision of the ESA tribunal, which had been raised before it, and that its failure to refer to it at all was an error of law.

33. Here it had been accepted by the Department on the basis of its own medical assessor's opinion for the purposes of ESA that the applicant satisfied Schedule 3, activity 11, namely "Cannot, due to impaired mental function, reliably initiate or complete at least 2 sequential personal actions". Mr McGuiness's submission was that the mobility activity 1 was satisfied on the basis that planning and following a journey indicated two sequential personal actions. While the applicant had been awarded points for prompting in daily living activities related to motivation, he submitted that anxiety also impaired her functioning in terms of engagement with other people, pointing to numerous missed appointments in the medical records as an indicator of avoidance due to overwhelming psychological distress, and the reference to "severe restrictions due to stress++" in the ESA reports.

34. I consider that the "read across" from the ESA descriptors accepted by the Department's medical assessor in the ESA evidence is not as clear cut as in the case of *LC v SSWP*. There, the evidence addressed ESA Schedule 2 activities and made specific findings. Here, the evidence addresses ESA Schedule 3 activities, and is more general. However, the submission by Mr McGuinness that there is some read across possible into PIP activities cannot be dismissed entirely. In particular, he submits that, together with other supportive evidence in the medical records, the

ESA evidence needed to be dealt with, whereas it was not expressly considered.

35. I accept the submissions that the ESA material was placed before the tribunal at the applicant's initiative, and that it was not expressly addressed by the tribunal. It may be that the tribunal considered that the ESA evidence could not be read across directly into the PIP activities and that it preferred the more directly relevant PIP medical assessment and evidence. It may be that it identified a conflict with other evidence before it that it preferred. Either course would have been open to it. I consider that it could not be faulted if it had articulated that either was its approach. However, the submission of the applicant highlights the lack of a reference to the broad thrust of the ESA evidence, namely that the applicant was highly stressed with severe restrictions on initiating and completing personal actions in the period a few months before the date of her PIP claim. I consider that the tribunal was required to address this submission, however briefly, and that the failure to refer to the material raised by the applicant is an error of law.

36. Mr McGuinness further submits that the tribunal erred by placing weight on how the applicant appeared at the hearing on June 2019. As a number of adjournments had occurred, and as a previous tribunal decision had been set aside in this case, the hearing was already well over two years after the date of decision. In the context that a tribunal may not consider circumstances not obtaining at the date the decision under appeal is made (by Article 13(8)(b) of the Social Security (NI) Order 1998), recording observations of an appellant at hearing and placing weight on them is something of a hostage to fortune. The particular tribunal linked them to the report of the HCP, saying:

> "The Appellant was noted to have good engagement with the assessor during the disability assessment. She was pleasant, maintained eye contact and did not become angry. The Appellant's presentation at the Tribunal hearing was similar".

37. Again, there is merit in Mr McGuinness' submission. Whereas the tribunal was not basing a finding on its observations of the applicant at the hearing in isolation, it was effectively corroborating the HCP's evidence with reference to those observations. If relying on observations at hearing, it needed to ascertain that they were equally applicable at the date of the decision under appeal. Making observations that it considered consistent with the HCP report of November 2016 was not enough. In order to rely on them, fairness required those observations to be put to the applicant for comment.

38. I accept that this also amounts to an error of law. Therefore, I allow the appeal. I set aside the decision of the appeal tribunal and refer the appeal to a newly constituted tribunal for determination. This has the

technical effect of removing the applicant's entitlement to the standard rate of the daily living component allowed by the tribunal for the period 8 February 2017 to 7 February 2020. However, as the end date of that award is already past, it may have no practical effect in the circumstances.

(signed): O Stockman

Commissioner

2 February 2021