KR-v-Department for Communities (DLA) [2022] NICom 11

Decision No: C1/22-23(DLA)

**RE: O R R (A CHILD)**

**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 26 April 2021

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 CN/4909/20/37/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 appellant is a child. His mother (the appointee) claimed disability living allowance (DLA) from the Department for Communities (the Department) from 4 January 2018 and he was awarded middle rate care component for a fixed period to 20 December 2019. The appointee submitted a renewal claim on the basis of needs arising from speech and language delay, Tourette's syndrome, autism and restrictive eating. On 16 November 2019 the Department decided on the basis of all the evidence that the appellant satisfied the conditions of entitlement to DLA at the middle rate of the care component from 21 December 2019 to 20 December 2022. The appointee sought a reconsideration, submitting further evidence. The decision was reconsidered but not revised. The appellant appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 26 April 2021 the tribunal disallowed the appeal, maintaining the award of middle rate care component. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 30 September 2021. 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 of the President of Appeal Tribunals issued on 7 November 2021 and reissued on 10 December 2021. On 10 January 2022 the appellant applied to a Social Security Commissioner for leave to appeal.

**Grounds**

5. The appellant, represented by Law Centre NI, submits that the tribunal has erred in law on the basis that:

   (i) its reasons were inadequate to explain its decision;

   (ii) it erred in law when applying the test for night time attention needs;

   (iii) it failed to address conflicts in evidence.

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

**The tribunal's decision**

7. 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, relevant decisions and further evidence. The tribunal accepted that the appellant required care and supervision sufficient to satisfy the conditions of entitlement to the middle rate care component. On night time care and supervision needs, the tribunal accepted that it was reasonable that the appellant would wear pull-up nappies at night, and found that while he did have some disturbed sleep, that he did not have significant sleep issues most nights, relying on the medical evidence. It judged that, while the appointee wakened at night, the appellant did not require someone to be awake for a prolonged period or at frequent intervals for the purpose of watching over him.

8. The tribunal accepted that the appointee required substantial guidance or supervision from another person most of the time when out of doors, but found that the appellant did not require substantially more guidance or supervision than a healthy child of the same age. It found that the

appellant was not unable to walk or virtually unable to walk. Therefore it did not award mobility component.

**Relevant legislation**

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

(1A) In its application to a person in relation to so much of a period as falls before the day on which he reaches the age of 16, subsection (1) above has effect subject to the following modifications—

(a) the condition mentioned in subsection (1)(a)(ii) above shall not apply, and

(b) none of the other conditions mentioned in subsection (1) above shall be taken to be satisfied unless—

(i) he has requirements of a description mentioned in the condition substantially in excess of the normal requirements of persons of his age, or

(ii) he has substantial requirements of such a description which younger persons in normal physical and mental health may also have but which persons of his age and in normal physical and mental health would not have.

(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.

10. The legislative basis of the mobility component is section 73 of the 1992 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.

…

(4A) In its application to a person in relation to so much of a period as falls before the day on which he reaches the age of 16, subsection (1) above has effect subject to the modification that the condition mentioned in paragraph (d) of that subsection shall not be taken to be satisfied unless—

(a) he requires substantially more guidance or supervision from another person than persons of his age in normal physical and mental health would require; or

(b) persons of his age in normal physical and mental health would not require such guidance or supervision.

**Submissions and hearing**

11. In written submissions on behalf of the appellant, the first ground advanced challenges the tribunal's decision to the effect that he did not have substantially more supervision needs than a child of the same age without a disability. The appellant had relied upon the report of an educational psychologist, which indicated that the appellant would refuse to hold an adult's hand and was likely to run off, and the report of a consultant paediatrician, that the appellant had very limited awareness of danger and fascination with wheels of moving vehicles. It was submitted that a five-year old who does not respond to verbal commands and refuses to take the hand of an adult requires substantially more supervision than a similar child in normal physical and mental health.

12. The second ground challenged the assessment of night time care needs. It was submitted that the tribunal, while accepting that attention needs were present, had failed to identify those night time attention needs. It was submitted that this was necessary in order to determine the nature and extent of the assistance required, and explain the tribunal's findings on whether the appellant had a need for prolonged or repeated attention at night. The appellant's third ground submitted that the tribunal failed to address conflicts in evidence and to give sufficient weight to the appointee's evidence when assessing the question of patterns of disturbed sleep.

13. In her written submissions, Ms Patterson for the Department did not accept the grounds advanced, submitting that it had given adequate reasons and reached a reasonable decision on the evidence.

14. I held an oral hearing of the application. Mr McCloskey of Law Centre NI appeared for the appellant. Ms Patterson of DMS appeared for the Department. I am grateful to each of them for their submissions.

15. At hearing, Mr McCloskey opened the relevant legislation with particular reference to section 72(1A)(a) and (b) of the 1992 Act. He submitted that, while not identically worded, essentially the same test was articulated in section 73(4A)(a) and (b) with regard to the low rate mobility component. He referred to paragraphs 42-44 of *BM v SSWP*, which considered the substantially in excess test in relation to care and mobility components. That decision was now reported as decision [2015] AACR 29. Its approach had been endorsed in Northern Ireland by Chief Commissioner Mullan in the case of *CM-v-Department for Social Development* [2016] NI Com 36 at paragraph 13.

16. Mr McCloskey submitted that the tribunal had found that the appellant required substantial guidance and supervision. He submitted that the tribunal had failed to demonstrate that it had regard to both elements of 73(4A)(a) and (b) and consequently had given inadequate reasons. While the tribunal had listed evidence it had not explained how it had analysed the evidence when reaching its findings. He submitted that the tribunal's findings bordered on the irrational – noting evidence of the child's supervision needs. However, recognising the difficult threshold in an irrationality challenge, he instead focused on the adequacy of the tribunal's reasons.

17. Relying on paragraphs 42-44 of *BM v SSWP*, Mr McCloskey submitted that it was not clear how the tribunal had analysed the findings it had made and reached its decision. He submitted that the evidence indicated that the appellant had needs in excess of a child of his age in normal health. He submitted that it was unclear why these were not accepted as being "substantially" in excess.

18. He made further submissions relating to night time care needs arising from the appellant's sleep problems and resulting dangers. He addressed the tribunal's findings on credibility. He referred to a post-decision Melatonin prescription showing problems with sleep. He submitted that the tribunal could have done more to address conflicts in evidence to the effect that sleep problems existed at date of decision. In the alternative he submitted that it should have clarified whether it considered that a change of circumstances had occurred since the date of decision.

19. Ms Patterson accepted that a different tribunal might have seen the evidence differently in relation to mobility. In particular she referred to the awareness of danger and the appellant's fascination with wheels. However, she submitted that the tribunal had not made an irrational decision. Nevertheless, at the hearing, Ms Patterson tended to agree with the submissions of Mr McCloskey on the adequacy of the tribunal's reasons. She submitted that the tribunal had addressed the evidence. However, in the light of *BM v SSWP* she accepted that more was required. She accepted that the tribunal had not met the standard set out in that case.

**Assessment**

20. 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.

21. 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.

22. 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.

23. The application addresses the tribunal's approach to the appellant's night time care and attention needs and to his requirement for guidance or supervision out of doors. In light of the concessions of Ms Patterson at hearing, giving support to the appellant's submissions, there is clearly an arguable case. Therefore, I grant leave to appeal. The parties consented, if I granted leave to appeal, to me proceeding to deal with the application as if it were an appeal.

24. There was consensus around the need for clear findings. Each party accepted that *BM v SSWP*, as approved by Chief Commissioner Mullan in *CM v DSD*, reflected the correct position of the law. The case of *BM v SSWP* deals with the requirements for findings that will inform the application of both limbs of the additional requirements placed on child claimants. These derive from the basic fact that all children from birth require care and supervision, which usually diminishes with age. In order to assess entitlement, the legislation requires the decision maker to carry out an exercise to sift out the needs that a child has due to a disablement from the needs that child has due simply to age.

25. The legislation relevant to care and mobility diverges slightly in its wording, but I consider that this is simply to accommodate the different tests involved. Both section 72(1A)(b) and section 73(4A) of the 1992 Act have two limbs. The first limb of section 72(1A)(b) discounts a child claimant's requirements for care or supervision unless those requirements are substantially in excess of the normal requirements of a person of his age. The second limb is satisfied if the child claimant continues to have substantial care or supervision requirements (which younger children may have) beyond the age at which those might normally stop. The first limb of section 73(4A) is satisfied when a child's requirement for guidance or supervision is substantially more than those of children of the same age in normal physical or mental health. The second limb is satisfied where the child requires guidance or supervision that children of the same age in normal physical or mental health would not require.

26. On the low rate mobility component, the tribunal had found that "due to the level of guidance and supervision normally required for such a child the Tribunal considered that the guidance and supervision required for [the appellant] was not substantially more than that required by a child of 5 years old in normal physical and mental health and that he did not require guidance or supervision which a child of 5 years of age in normal physical and mental health would not require". This seems to me to paraphrase the legislative test accurately and concisely.

27. However, the parties queried the tribunal's approach to making and recording findings in the case. Each pointed to paragraphs 42-44 of *BM v SSWP*, which read:

> "42. I find that the tribunal did err in law in deciding that *BM* https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKUT/AAC/2015/18.html&query=(title:(+BM+))+AND+(Markus) - disp30was not entitled to the lower rate mobility component. In *KM* the three judge panel said at paragraph 54 that section 73 generally requires a similar fact finding approach to that required by section 72. At paragraph 57 they observed that, as with section 72(1A)(b), a determination under section 73(4A) is assisted by the correct approach to decision-making as to the primary conditions of entitlement.
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> 43. The starting point for the tribunal in the present case should have been to identify what relevant assistance *BM* required when walking out of doors. This may not have been limited to guidance in crossing the road. Indeed, as the Secretary of State has pointed out, the claim form completed on behalf of *BM* identified a number of difficulties which might have brought his case within section 73(1)(d). The tribunal should then have to identified the nature and degree of any guidance or supervision that was required and whether it was substantially more than the requirements for guidance or supervision of 6 year olds in normal physical and mental health, or whether 6 year olds in normal physical and mental health would not require such guidance or supervision.
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> 44. Even if the only assistance that *BM*https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKUT/AAC/2015/18.html&query=(title:(+BM+))+AND+(Markus) - disp35 required was guidance in crossing the road, the fact that all 6 year olds need guidance in crossing the road did not dispose of the case. It would depend on (in shorthand) whether he needed substantially m\ore guidance or different guidance."

28. In the particular case the tribunal had accepted that the appellant required guidance and supervision out of doors. It accepted that he required more guidance and supervision than a child of his age in normal physical and mental health. However, taking into account the normal needs of 5 year olds, it was not satisfied that the requirements were substantially more than required by such a child.

29. Mr McCloskey had referred to evidence from the appointee, an educational psychologist and a community paediatric specialist to the effect that the appellant lacked awareness of danger, would not hold an adult's hand, was likely to run off without recognising danger, tended to act impulsively and had a fascination with the wheels of moving vehicles. He had sought to draw direct comparison with the behaviour of the appellant's twin, as evidence of different needs of an identically aged child. However, in this context, I do not accept that reliance on a named comparator is appropriate. The correct comparison is with children of the same age in good health in general.

30. Relying on paragraph 43 of *BM v SSWP*, Mr McCloskey submitted that the tribunal had not made specific findings to distinguish between what it considered to be the normal needs of a child of the appellant's age and the needs of the particular appellant sufficiently. He submitted that the evidence pointed to aspects of the appellant's behaviour that were substantially in excess of those of other 5 year olds, but that it was not clear from its findings and reasons what requirements the tribunal had accepted as normal and what it found to be in excess of normal.

31. Both he and Ms Patterson accepted that a different tribunal could have decided the case differently on the same evidence. Each noted the difficulty of establishing that a decision was irrational. That was not Mr McCloskey's submission, however. He confined the submission to a reasons challenge in the light of paragraph 43 above, and Ms Patterson came to support his analysis.

32. It does appear to me that there is merit in the submission. The tribunal has set out the evidence before it, finding, as noted above, that the child had requirements that were in excess of those of a healthy child of the same age, but which were not substantially in excess. In order to understand the decision fully, I consider that it is necessary to understand what the tribunal would have considered as the particular appellant's guidance or supervision needs, to what extent these exceeded the normal requirements of a healthy 5 year old, and whether it considered that these excess requirements were not substantial. In this context, it should be noted that the quality and the quantity of any supervision has to be assessed. The evidence in this case tends to demonstrate that a heightened level of supervision or restraint might reasonably be required by the particular appellant but the extent to which the tribunal accepted this is not clear.

33. In short, in the absence of the tribunal following the helpful framework set out in paragraph 43 of *BM v SSWP*, which has been accepted as good law in Northern Ireland, it is not possible to understand the tribunal's findings as to what were the excess needs of the appellant and to appraise its assessment that these were not substantial.

34. I accept the submissions of the parties on the low rate mobility component. I allow the appeal and I set aside the decision of the appeal tribunal on that basis. I do not need to consider the arguments concerning night time care needs and will not do so.

**Disposal**

35. Mr McCloskey had asked, if I was minded to set aside the decision of the appeal tribunal, that I should remit the appeal to a newly constituted tribunal. Ms Patterson agreed.

36. I further accept the submissions of the parties on this point and I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

31 May 2022