MMcC-v-Department for Communities (PIP) [2022] NICom 16

Decision No: C16/21-22(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 2 December 2020

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 2 December 2020 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 her 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 9 July 2019 a decision maker of the Department decided that the appellant was not entitled to either component of PIP for the period from and including 11 March 2019. Following a request to that effect the decision dated 9 July 2019 was reconsidered on 28 September 2019 and was revised. The decision maker did apply a descriptor from Part 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations') which the initial decision maker had not applied. The score for this descriptor was insufficient for an award of entitlement to the daily living component of PIP at the standard rate – see article 83 of the Welfare Reform (Northern Ireland) Order 2015 and regulation 5 of the 2016 Regulations.

6. Following the receipt of representations from the appellant's solicitor, additional medical evidence and a supplementary Departmental report, the decision dated 9 July 2019 was reconsidered again on 6 February 2020 and was revised further. Once again, the decision maker applied a further descriptor from Part 2 of Schedule 1 to 2016 Regulations which the initial decision makers had not applied. The score for this descriptor, combined with the descriptor which was applied in the revision decision of 28 September 2019 was insufficient for an award of entitlement to the daily living component of PIP at the standard rate.

7. An appeal against the decision dated 9 July 2019, as revised on 28 September 2019 and 6 February 2020, was received in the Department on 19 June 2020.

8. The appeal tribunal hearing took place on 2 December 2020. The appellant was present and was represented by Mr McManus. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision of 9 July 2019, as revised on 28 September 2019 and 6 February 2020.

9. On 3 February 2021 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 9 April 2021 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

10. On 27 April 2021 a further application for leave to appeal was received in the office of the Social Security Commissioners. On 24 May 2021 observations on the application for leave to appeal were requested from Decision Making Services ('DMS'). In written observations dated 23 June 2021, Mr Killeen, for DMS, supported the application on certain of the grounds advanced on behalf of the appellant.

11. The written observations were shared with the appellant and Mr McManus on 23 June 2021. On 18 August 2021 I granted leave to appeal. When granting leave to appeal, I gave as a reason that it was arguable that the appeal tribunal had erred in the manner in which it assessed the evidence which was before it. On the same date I determined that an oral hearing of the appeal would not be required.

Errors of law

12. 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?

13. 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');
>
> (ii) failing to give reasons or any adequate reasons for findings on material matters;
>
> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> (iv) giving weight to immaterial matters;
>
> (v) making a material misdirection of law on any material matter;
>
> (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …difference to the outcome do not matter."

Analysis

14. In the application for leave to appeal Mr McManus set out the following grounds of appeal:

> 'It would appear in the rationale for this decision that the tribunal accepted that the appellant suffered mental health issues and physical problems and concluded that she met the eligibility test for components of the daily living

component and affirmed the decision of the earlier decision maker.

Thereafter the Tribunal however dismissed the remainder of the appellant evidence with regard to functional ability albeit without any degree of specification as to the material matters which brought them to this decision.

It is asserted in generality that the appellant is not credible whilst during the hearing did not seek to challenge the appellant on the content of her evidence or in answer to the questions raised by members of the Panel. It is also of note that no representative of the Department was present.

An over reliance was placed upon the medical report at Page 39 of the bundle by a disability assessor/ physiotherapist whose professional competence is not to assess the mental health presentation and well-being of any appellant but rather their physical impediments. Therefore the GP notes and records within the bundle represented a mental health history of a significant and enduring nature punctuated with serious incidents of self-harm.

The assessment of the disability assessor/physiotherapist was conducted for thirty-three minutes in the absence of the GP notes and records of the appellant and in our submission undue reliance and weight was attached to this document by the Tribunal as is referenced in the reasoning of the tribunal.

…

There is a clear duty on appeal tribunals to undertake a rigorous assessment of all of the evidence before it and to give an ***explicit*** explanation as to why it has preferred, accepted or rejected evidence which is before it and which is relevant to the issues arising in the appeal.

In *R2/04(DLA)* a Tribunal of Commissioners, stated, at paragraph 22(5):

> ' ... ***there will be cases where the medical evidence before a particular tribunal will be unsatisfactory or deficient in an important respect. It will often be open to the tribunal hearing such a case to reject the medical evidence for that reason. Indeed, it will sometimes be its duty to do so. However, and in either case, the***

> ***tribunal cannot simply ignore medical evidence which is not obviously irrelevant. It must acknowledge its existence and explain its reasons for rejecting it, even if, as will often be appropriate, such reasons are fairly short."***

In this particular instance and for the reasons elucidated above we respectfully submit that the decision is irrational, perverse, attaches undue weight to medical opinion, which is beyond its remit, fails to resolve material facts in dispute and provides an inadequacy of rationale for decision making.'

15. In his written observations on the application for leave to appeal, Mr Killeen made the following submissions:

'The documents considered by the tribunal includes *"Departmental submissions including medical evidence provided by appellant"*. There is no indication that additional evidence was submitted in advance or on the day of hearing, and therefore the tribunal relied on the evidence within the submission papers. This includes an ESA medical report, a GP print off and numerous medical letters, the majority of which are dated within a year or two prior to the date of decision.

In the Record of Proceedings her representative, Mr John MacManus of Quigley MacManus Solicitors is recorded to have said the following:

> *"The Health Care assessment was done by a physio and it took 33 minutes. The GP records from page 117 show that Mental Health has been of significance for a number of years and that pain in her back due to kidney problems have caused significant difficulties. Surgery has not lessened the pain. There is evidence of physical and mental impediments before and after the application. The ESA report shows evidence of significant pain in her kidney and back. There is a consistent history of mental and physical problems."*

In this instance, the representative essentially contended during the hearing that the assessment report did not reflect (the appellant's) circumstances, that her back pain

was enduring and her mental health caused significant difficulties.

In the NI decision C8/08-09(IB), the now Chief Commissioner Mullan stated:

> *"60. …there is a clear duty on appeal tribunals to undertake a rigorous assessment of all of the evidence before it and to give an explicit explanation as to why it has preferred, accepted or rejected evidence which is before it and which is relevant to the issues arising in the appeal."*

…

Having reviewed the Reasons for Decision in full, the tribunal does not appear to have engaged with any of the matters raised by the representative and in particular with any other evidence other than the assessment report.

…

… while it has referenced the Department's submission and the medical evidence submitted by (the appellant) I contend that this is not sufficient, the tribunal has not adequately assessed the evidence before it nor has it satisfied its inquisitorial role.'

16. It is axiomatic that I accept that the assessment of evidence, including the evidence of the appellant, is a matter for the appeal tribunal. In *C14/02-03(DLA)*, Commissioner Brown, at paragraph 11, stated:

> ' … there is no universal rule that a Tribunal must always explain its assessment of credibility. It will usually be enough for a Tribunal to say that it does not believe a witness.'

17. Additionally, in *R3-01(IB)(T)*, a Tribunal of Commissioners, at paragraph 22 repeated what the duty is:

> 'We do not consider that there is any universal obligation on a Tribunal to explain its assessment of credibility. We disagree with *CSIB/459/*97 in that respect. There may of course be occasions when this is necessary but it is not an absolute rule that this must always be done. If a Tribunal makes clear that it does not believe a claimant's evidence or that it considers him to be exaggerating this will usually be sufficient. The Tribunal is not required to give reasons for its reasons. There may be situations when a further

> explanation will be required but the only standard is that the reasons should explain the decision. It will, however, normally be a sufficient explanation for rejecting an item of evidence, including evidence of a party to an appeal, to say that the witness is not believed or is exaggerating.'

18. This reasoning was confirmed in *CIS/4022/2007*. After analysing a series of authorities on the issue of the assessment of credibility, including *R3-01(IB)(T)*, the Deputy Commissioner (as he then was) summarised, at paragraph 52, as follows:

> 'In my assessment the fundamental principles to be derived from these cases and to be applied by tribunals where credibility is in issue may be summarised as follows: (1) there is no formal requirement that a claimant's evidence be corroborated – but, although it is not a prerequisite, corroborative evidence may well reinforce the claimant's evidence; (2) equally, there is no obligation on a tribunal simply to accept a claimant's evidence as credible; (3) the decision on credibility is a decision for the tribunal in the exercise of its judgment, weighing and taking into account all relevant considerations (e.g. the person's reliability, the internal consistency of their account, its consistency with other evidence, its inherent plausibility, etc, whilst bearing in mind that the bare-faced liar may appear wholly consistent and the truthful witness's account may have gaps and discrepancies, not least due to forgetfulness or mental health problems); (4) subject to the requirements of natural justice, there is no obligation on a tribunal to put a finding as to credibility to a party for comment before reaching a decision; (5) having arrived at its decision, there is no universal obligation on tribunals to explain assessments of credibility in every instance; (6) there is, however, an obligation on a tribunal to give adequate reasons for its decision, which may, depending on the circumstances, include a brief explanation as to why a particular piece of evidence has not been accepted. As the Northern Ireland Tribunal of Commissioners explained in R 3/01(IB)(T), ultimately "the only rule is that the reasons for the decision must make the decision comprehensible to a reasonable person reading it"'.

19. The appeal tribunal in the instant case cited this caselaw in the statement of reasons for its decision.

20. It is equally clear that an appeal on a question of law should not be permitted to become a re-hearing or further assessment of the evidence, when that assessment has already been fully and thoroughly undertaken.

21. In my view, the issue is finely balanced. I am of the view, however, that the appeal tribunal was under a duty to assess all of the evidence which was available to it and this included the evidence referred to it by Mr McManus in his submission at the oral hearing. While there is reference to the 'available medical evidence' in the statement of reasons, it is in the most general of terms and in insufficient specificty. For that reason, I am satisfied that the decision of the appeal tribunal is in error of law.

Disposal

22. The decision of the appeal tribunal dated 2 December 2020 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.

23. 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 9 July 2019, as revised on 28 September 2019 and 6 February 2020 in which various decision makers decided that the appellant was not entitled to either component of PIP for the fixed period from and including 11 March 2019;

    (ii) the Department is directed to provide details of any subsequent claims to PIP and the outcome of any such claims to the appeal tribunal to which the appeal is being referred. The appeal tribunal is directed to take any evidence of subsequent claims to PIP into account in line with the principles set out in *C20/04-05(DLA)*;

    (iv) 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

    (v) 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

16 August 2022