JAS-v-Department for Communities (PIP) [2019] NICom 35

Decision No: C9/19-20(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 9 January 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 9 January 2018 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. For further reasons set out below, 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 his 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 16 March 2017 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 20 January 2017. Following a request to that effect, and the receipt of further medical evidence, the decision dated 16 March 2017 was reconsidered on 29 April 2017 and was revised. The revised decision was that the appellant was entitled to the standard rate of the mobility component of PIP for a fixed-term period from 19 April 2017 to 23 February 2020 but remain disentitled to the daily living component of PIP from and including 20 January 2017. Further medical evidence was received in the Department following notification of the revised decision and an appeal against the decision dated 16 March 2017 as revised on 29 April 2017 was received on 5 June 2017.

6. The appeal tribunal hearing took place on 9 January 2018. The appellant was present and was represented by Ms Holden of the Citizens Advice organisation. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 16 March 2017 as revised on 29 April 2017. The appeal tribunal did apply did apply descriptors from Part 2 of Schedule 2 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations') which the decision maker had not applied. The score for these descriptors 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.

7. On 6 September 2018 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 5 October 2018 the application for leave to appeal was refused by the legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 6 November 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 22 November 2018 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 12 December 2018 Mr Arthurs, for DMS supported the application. Written observations were shared with the appellant on 13 December 2018. Written observations in reply were received from the appellant's wife on 28 December 2018 which were shared with Mr Arthurs on 2 January 2019.

9. On 30 April 2019 I granted leave when to appeal. When granting leave to appeal I gave, as a reason, that certain of the grounds of appeal were

arguable. On the same date I determined that an oral hearing of the appeal would not be required.

Errors of law

10. 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?

11. 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');
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> (ii) failing to give reasons or any adequate reasons for findings on material matters;
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> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
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> (iv) giving weight to immaterial matters;
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> (v) making a material misdirection of law on any material matter;
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> (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …
>
> Each of these grounds for detecting any error of law contains the word 'material' (or 'immaterial'). Errors of law of which it can be said that they would have made no difference to the outcome do not matter."

Analysis

12. The appellant was represented in the application for leave to appeal by his wife. Her primary ground of appeal was that the appeal tribunal did not have before it sufficient medical evidence to support its conclusions with respect to entitlement to the daily living component of PIP. She submitted:

> 'Through nobody's fault the attached medical evidence was not available from the Royal Victoria Hospital but it is important in explaining appellant's appeal for reconsideration of Descriptors 2 and 3 (Daily Living

Activities). The attached evidence states that appellant does suffer from hypos (Hypoglycaemia).

NEW EVIDENCE ATTACHED:

Appendix 2a, 2b – 'Diabetes Encounter Letters' issued by RVH Diabetic Clinic, Belfast Health Trust, dated 2 May 2018 and 6 October 2018.

I am the spouse of (the appellant) and I am enclosing additional medical evidence which was not available to the last tribunal so incorrect assumptions were made by the panel. I have added some information below in relation to points awarded to two Descriptors.'

13. The appellant's wife then made more detailed submissions on the approach taken by the appeal tribunal to the potential application of Activities 2 and 3 in Part 2 of Schedule 2 to the 2016 Regulations.

14. Article 13(8)(b) of the Social Security (Northern Ireland) Order 1998 provides –

> '(8) In deciding an appeal under this Article, an appeal tribunal –
>
> (a) …….
>
> (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.'

15. In *C24/03-04(DLA)*, at paragraph 8, the Commissioner approved of the following statement of law set out in paragraph 9 of *R(DLA) 2/01*:

> '… In the case of a claim for a Disability Living Allowance, the jurisdiction {of an Appeal Tribunal} is limited to the inclusive period from the date of claim to the date of the decision under appeal. The only evidence that is relevant is evidence that relates to the period over which the tribunal has jurisdiction. However it is the time to which the evidence relates that is significant, not the date when the evidence was written or given. It does not limit the tribunal to the evidence that was before the officer who made the decision. It does not limit the tribunal to evidence that was in existence at that date. If evidence is written or given after the date of the decision under appeal, the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible. If it relates to a later time it is not admissible.'

16. Although, the principles in the cases cited above were in the context of disability living allowance they are applicable, in my view, to how appeal tribunals in social security appeals should address the issue of consideration of evidence which post-dates the decision under appeal.

17. Accordingly, the appeal tribunal was limited to taking account of evidence that was relative to the period over which it has jurisdiction under Article 13(8)(b). The principles in *R(DLA)2/01* give an accurate summary of the relevant legal principles, and confirm why, as a general rule, the unavailability of evidence before the appeal tribunal, cannot succeed as a ground for applying for leave to appeal to the Social Security Commissioner. In short, an appeal tribunal cannot be faulted for not considering evidence, including medical evidence, which was not before it and, indeed, did not exist at the date of the appeal tribunal hearing. In the instant case, the date of the appeal tribunal hearing was 9 January 2018 and the dates of the 'new' medical evidence are 2 May 2018 and 6 October 2018.

18. Nonetheless, Mr Arthurs, in his role as an *amicus curiae*, has submitted that the reasoning of the appeal tribunal in respect of the potential application of Activities 2 and 3 in Part 2 of Schedule 2 to the 2016 Regulations was, in any event and absent the 'new' medical evidence, problematic. He stated the following, in his written observations:

> 'First of all I would point out that the tribunal would have been aware that (the appellant) suffers from hypos I would refer to tab 13 of the scheduled documents which is GP factual report (dated 28 August 2015) in relation to (the appellant's) claim to DLA. In response to question 7 Dr G records:
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> > *"Can manage his own diabetes very well.*
> >
> > *Control good*
> >
> > *No recent hypos"*
>
> I would also imagine if there were any other issues relating to hypos that theses would have been detailed in the GP records which were before the tribunal.
>
> In his application for leave to appeal (the appellant) states: *"At Capita assessment, it was not recorded that the suffered from hypos even though we did mention it on more than one occasion during the interview."* It therefore needs to be determined if the tribunal addressed the issue of his hypoglycaemia and the functional limitations arising from this.

Hypoglycaemia is a condition that occurs when your blood sugars are too low and would be suffered by diabetics (though not only diabetics). When affected by this (the appellant) claims he suffers from: *"…symptoms including severe dizziness which means he has to lie down and he usually falls asleep instead of eating food in order to raise sugar levels."* It has been recorded in his PA4 V3 form that his primary medical condition is 'Gilbert's disease' and his diabetes is listed in his other conditions, therefore not even as relevant as his secondary condition of arms spasms and body aches. I suggest that the tribunal should have been considering his diabetes in association with his other conditions especially as his primary condition involves: *"…fatigue all the time and general aches all over his body that come and go throughout the day. This affects his ability to carry out the daily activities."* If someone in (the appellant's) claimed circumstances is prone to bouts of low energy and falls asleep they may forget to eat. I believe the tribunal should have made findings into how his other conditions affect him in conjunction with his primary or secondary conditions.

When dealing with Activity 2 the tribunal had the following to say:

> *"c. The appellant has no diagnosed mental health condition and has been prescribed no antidepressants. In consequence the Tribunal did not accept that the Appellant would, by reason arising from a mental health disability, require to be prompted adequately to carry out any of the daily living activities but particularly activities 2 and 10."*

I do not believe the tribunal was entitled to summarise its decision in such a way as the appellant had made clear references to prompting in the Mandatory Reconsideration application of 10 April 2017 and Appeal application of 24 May 2017 where (the appellant) states, respectively:

> *"J is a type 1 diabetic with other complications including hypothyroidism, he can be very fatigued and lethargic at times as stated on his GP's letter; in these instances he does need prompting to eat a snack or sometimes a sugary drink if his*

blood sugar levels are low (hypoglycaemic).; and

I am a Type 1 diabetic with other complications including hypothyroidism, I can be extremely fatigued and lethargic on daily basis as stated on my GP's letter (Dr O'H); I do need prompting to test my sugar levels and then eat a snack or sometimes a sugary drink if my blood sugar levels are low (hypoglycaemia)."

Having mentioned the need for prompting in his two most recent communications it would have been prudent for the tribunal to investigate the functional limitations claimed and determine if they are sufficient to be considered a cognitive impairment preventing (the appellant) from completing this activity. Having provided virtually no analysis for why they declined to award points in this activity I contend that the tribunal have not sufficiently justified their decision and have erred in law.

Activity 3 Managing therapy or monitoring a health condition

(The appellant's) main contention here is that the treatment he receives from his wife occurs in the night as well as during the day. (The appellant) was awarded 1 point for this activity under *(b)(i) needs to use an aid or appliance to be able to manage medication*. If prompting is established it would lead to an award between 2 and 6 points, depending on the accepted amount of time it is stated to take. It would be incumbent upon the tribunal to obtain this information if it accepted that (the appellant's wife) was assisting as claimed.

I would again draw attention to (the appellant's) Mandatory Reconsideration letter and his Appeal letter where he states, respectively:

"Although, at time, he can take his own blood sugar readings, he has to been prompted and reminded to do so; these readings are taken daily, at least 5 times per day, 7 days a week, taking 10-12 minutes each time; this may also occur in the middle of the night….; and

Although, on some occasions, I can take my own blood sugar readings, I have to be

prompted and reminded to do so; these readings are taken daily, at least 5 times per day, 7 days a week, taking 10-12 minutes each time; this may also occur in the middle of the night…."

If what (the appellant) states is true then his wife can provide a minimum of 50 minutes per day 7 days a week meaning she can provide a minimum of 5 hours and 50 minutes per week. If this were accepted then an award 4 points under descriptor *(d) (Needs supervision, prompting or assistance to be able to manage therapy that takes more than 3.5 but no more than 7 hours per week*) would have been appropriate.

In their reasons the tribunal had the following to offer regarding this activity:

"8. <u>Daily living component considered</u>

a. The Appellant has been diagnosed with Gilbert's Disease, a blood disorder. The Tribunal accepted that the Appellant's function was affected by fatigue and by widespread aches and pains. The Appellant also has low back pain and was observed to be significantly overweight.

b. The Appellants is an insulin dependent Type 1 diabetic and he checks his own sugar level 5 times per day.

The Tribunal accepted that by reason of the Appellant's fatigue it was often necessary, for safety, for the Appellant's wife to carry out blood tests using a glucometer. The Tribunal awarded Descriptor 3(b)(1) and 1 Descriptor point."

It is clear from the above that the tribunal have not considered the amount of time that (the appellant) requires assistance with this activity, despite accepting that it was often necessary for his wife to carry out blood tests. I believe the tribunal has failed in its inquisitorial role by not investigating this matter further.

In view of the above it is my submission that the tribunal has erred in law.'

19. I accept the constructive submissions made by Mr Arthurs and, for the reasons which he has outlined, agree that the decision of the appeal tribunal is in error of law.

Disposal

20. The decision of the appeal tribunal dated 9 January 2018 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.

21. 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 16 March 2017 as revised on 29 April 2017 that the appellant is entitled to the standard rate of the mobility component of PIP for a fixed-term period from 19 April 2017 to 23 February 2020 but remain disentitled to the daily living component of PIP from and including 20 January 2017;
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> (ii) the appellant will wish to consider what was said at paragraph 77 of *C15/08-09 (DLA)* concerning the powers available to the appeal tribunal and the appellant's options in relation to those powers;
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> (iii) 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
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> (iv) 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

8 July 2019