GA-v-Department for Communities (PIP) [2020] NICom 17

Decision No: C31/19-20(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 14 May 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 14 May 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. 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 8 November 2017 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 12 September 2017. Following a request to that effect, the decision dated 8 November 2017 was reconsidered on 28 November 2017 but was not changed. An appeal against the decision dated 8 November 2017 was received in the Department on 18 December 2017.

6. The appeal tribunal hearing took place on 14 May 2018. The appellant was present and was accompanied by his mother. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 8 November 2017.

7. On 4 December 2018 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). The appellant was represented in this application by Mr McCloskey of the Law Centre (Northern Ireland). On 7 January 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 8 February 2019 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 11 March 2019 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 3 April 2019, Mr Arthurs, for DMS, supported the application on certain of the grounds advanced on behalf of the appellant. The written observations were shared with the appellant and Mr McCloskey on 4 April 2019. On 2 May 2019 correspondence was received from Mr McCloskey in which he indicated that he had no further observations to make in response to those of the Department.

9. The file became part of my workload on 25 September 2019. On 17 October 2019 I granted leave to appeal. When granting leave to appeal I gave as a reason that certain of the grounds of appeal, as set out in the application for leave to 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; …
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> 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. In the application for leave to appeal, Mr McCloskey made the following submission:

> 'In this case a Clinical Psychologist has provided a detailed and specific report which provided opinion and content. Although the tribunal refer to this report intermittently in the reasons there are multiple occasions that this report provides supportive information which the tribunal have failed to note and adequately address.
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> It is submitted that the tribunal's reasons were materially deficient as it failed to explicitly state why it has preferred, accepted or reject evidence from the clinical psychologist in relation to the following activities - Preparing food, Dressing and undressing, Communicating verbally, Engaging with others face

to face, Making Budgeting decisions and Planning and following journeys.'

13. As was noted above, in his written observations on the application for leave to appeal, Mr Arthurs has supported this ground of appeal.

14. A copy of the report referred to by Mr McCloskey is in the file of papers which is before me. It is dated 2 May 2018 and was prepared for the oral hearing of the appeal by a Clinical Psychologist. It is one of the most detailed and comprehensive medical reports which I have known to have been presented in connection with an appeal tribunal hearing in connection with entitlement to a social security benefit. It is fourteen pages in length and has the following sections:

    Purpose of report
    Sources of information referenced in report (15 in total)
    Presentation (by the appellant)
    Personal history
    Medical history (for each reported medical problem)
    Psychiatric history
    Cognitive functioning - Results from previous cognitive testing
    Results from current cognitive testing
    Current medication
    Current input
    Functional history (for each relevant PIP activity)
    Comments on (the appellant's) PIP Consultation report
    Opinion on (the appellant's) ability to carry out daily living activities (for 10 such activities and both mobility activities))
    Response to mandatory Reconsideration notice (from decision maker) dated 22 June 2017

15. The record of proceedings for the appeal tribunal hearing notes that the appeal tribunal had a copy of the relevant report before it. In the statement of reasons for the appeal tribunal's reasons, and as was noted by Mr McCloskey, there is an occasional reference to the contents of the report. I have noted that in two places the report is referred to as being a 'physiological report' but those might be no more than typographical errors. More significantly and as has been agreed by the parties there is no reference to how that the appeal tribunal assessed the evidence and opinion contained within the report and/or why that evidence and opinion was not considered or rejected. As was submitted by Mr McCloskey, the contents of the report were relevant to the potential application of a number of activities Parts 2 and 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations'). One example is sufficient to illustrate the overall omission by the appeal tribunal to note and assess the relevance of the report as a whole.

16. In section 6.11 of the report, the Clinical Psychologist states the following:

> '(The appellant) reports difficulties planning and taking journeys and being unable to use public transport. He finds estimating how long journeys take difficult and has problems following verbal directions, reading route plans, understanding visual route plans, remembering roots and reading signs. He also reports frequently getting lost even when taking familiar routes, difficulty getting back on route, needing to ask for directions or to telephone his mother. Results from cognitive testing revealed impairment in planning, organising, visual–spatial abilities, verbal and visual memory, complex reasoning and problem-solving abilities. Such cognitive impairment will impact on (the appellant's) ability to plan, remember and follow a route, remember directions and deal with unexpected circumstances e.g. getting lost. When having to take an unfamiliar route (the appellant) first travels it with his parents before attempting it himself alone. However taking journeys alone causes (the appellant) extreme psychological distress prior to, during and after doing so. He therefore prefers to have someone accompany him on journeys to alleviate the psychological distress that comes with planning and following a route. Needing to be accompanied by someone to avoid the overwhelming psychological distress he experiences would not, in my opinion, be unreasonable. **Opinion:** It would therefore be my opinion that (the appellant) would be unable to reliably plan and follow the route of the journey.'

17. In the statement of reasons for the appeal tribunal's decision, the appeal tribunal has set out the following conclusions with respect to the activity of 'Planning and Following Journeys':

> 'The Appellant said he could not follow the route of an unfamiliar journey without another person, assistance dog and orientation aid. The appellant gave oral evidence that he would look up the route in advance on the computer and would go with his mum. He gave oral evidence that he used to drive to Belfast but that was the same place and same journey and that he used to work with a mixture of getting lifts and driving. The Appellant drives by car to his parents' house around the corner every day. T he Appellant goes on holidays with his parents. The Appellant is not on any medication for anxiety or depression and the reference in his GP notes to any anxiety relates to his frustration since being made redundant in 2011.

> The Tribunal accepted the conclusion of the Health Care Professional as detailed on page 19 of the report dated 18 October 2017. Accordingly the Tribunal found that the Appellant could plan and follow the route of journey unaided and safely, to an acceptable standard, repeatedly and within a reasonable timeframe. The Tribunal considered that the Appellant did not fall into the remit of the descriptors in this activity.'

18. In *C8/08-09(IB)*, I stated, at paragraphs 60-61:

> '60. The reason for my rejection of the DMS submission is that 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.
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> 61. In *R2/04(DLA)* a Tribunal of Commissioners, stated, at paragraph 22(5):
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> > ' … 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. We repeat, the decision whether a person suffers from a particular medical condition is a matter for the tribunal. That body must have regard to the whole of the evidence, including the medical evidence. Where it rejects medical evidence it must, unless the reasons are otherwise apparent, explain why it does so. Anything less is likely to result in an appeal being brought on the grounds that the tribunal has not given adequate reasons or that its decision is against the weight of the evidence.''

19. In *SW v Secretary of State for Work and Pensions* [2010] UKUT 73 (AAC), Upper Tribunal Judge Wikeley stated, at paragraphs 19 to 20:

’19. In *Hampshire County Council v JP* [2009] UKUT 239 (AAC) a three-judge panel of the Upper Tribunal explained the requirement to give reasons as follows:

> “… where there is a crucial disagreement between experts and ‘the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other’ (*Flannery v Halifax Estate Agencies Limited* [2001] 1 WLR 377 (CA)’ (at paragraph 39)

20. Similarly, a different three-judge panel of the Upper Tribunal in *BB v South London and Maudsley NHS trust* [2009] UKUT 157 (AAC) concluded that a First-tier Tribunal in the mental health jurisdiction had failed to give adequate reasons for its decision. In that case the appellant had produced a supportive expert report by a Dr Cripps. The Upper Tribunal observed that:

> “In Dr Cripps’s report the tribunal had a coherent reasoned opinion expressed by a suitably qualified expert. We consider that in the circumstances of the present case the tribunal needed to state with clarity how and why it disagreed with the reasoning of Dr Cripps” (at paragraph 18).’

20. In the instant case, in the reasons for the appeal tribunal’s conclusions with respect to the activity of ‘Planning and Following Journeys’, there is no reference whatsoever to the evidence contained in the report of the Clinical Psychologist when such reference was mandated. The omission in the reasons for this activity is replicated in the reasons set out by the appeal tribunal for its conclusions with respect to other activities.

21. Accordingly, I have concluded that the decision of the appeal tribunal is in error of law and I set it aside.

Disposal

22. The decision of the appeal tribunal dated 14 May 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.

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 8 November 2017 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 12 September 2017;

(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)*;

(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

(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

26 February 2020