PMcG-v-Department for Communities (PIP) [2021] NICom 3

Decision No: C36/20-21(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 27 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 reference EK/8525/18/02/D.

2. For the reasons I give below, I grant leave to appeal. I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I direct that the appeal shall be determined by a newly constituted tribunal.

REASONS

Background

3. The applicant claimed Personal Independence Payment (PIP) from the Department for Communities (the Department) from 23 February 2018 on the basis of needs arising from hypercholesterolemia, angina, hiatus hernia, arthritis, carpal tunnel syndrome, duodenitis, essential hypertension, oesophageal reflux with oesophagitis and stromal corneal dystrophy. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 23 March 2018, including a list of prescriptions and hospital discharge letters. The applicant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 16 May 2018. On 31 May 2018 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 23 February 2018. The applicant requested a

reconsideration of the decision, submitting further evidence. He was notified that the decision had been reconsidered by the Department but not revised. He 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. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 22 October 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 15 January 2020. On 12 February 2020 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The applicant submits that the tribunal has erred in law by:

   (i) making an error of fact about his medical condition;

   (ii) accepting misrepresentations of fact made in the HCP report.

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

7. The applicant duly responded by submitting further medical evidence.

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, a list of prescriptions, a statement of functional limitations, hospital discharge letters, a consultation report from the HCP, a letter from orthopaedic ICATS and a supplementary medical report, and a submission from the applicant attaching further medical information and evidence. The tribunal indicates in the record of proceedings that the applicant had waived his right to an oral hearing, referring to the return of a REG2 form to this effect.

9. The tribunal noted the applicant's medical conditions and considered his GP notes and records, observing that the applicant's possible peripheral neuropathy was not considered severe enough to warrant further investigation, that he had waived an offer of total knee replacement as he felt his symptoms were not severe enough, that cardiology investigations were normal and that all his other conditions were addressed and well

managed. The tribunal found that in consequence of the applicant's decision not to attend the hearing it was limited in assessing the extent of his limitations.

10. It found that evidence in the GP notes and records supported a finding of limitation in two areas, namely daily living activity 8 and mobility activity 2, awarding points. However, these were not enough to reach the threshold number of points required for entitlement and the appeal was disallowed.

Relevant legislation

11. 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.

12. 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.

Assessment

13. 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.

14. 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.

15. 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.

16. However, the Commissioner is not confined to the issues raised by the formal grounds of appeal. Following *Mongan v Department for Social Development* [2005] NICA 16, a Commissioner has a role to identify arguable issues clearly apparent from the evidence, even if they have not been expressly articulated by the appellant.

17. The grounds submitted by the applicant take issue with the tribunal's findings. He observed that the tribunal said that it did not have oral evidence or submissions from him, yet he had submitted a typed response to the HCP's report. He submitted that the tribunal had mistakenly stated that he had Barrett's Oesophagus, whereas he did not suffer from that condition. He submitted that there were errors and contradictions in the HCP report about his disabilities and that it did not reflect what he had said to the HCP.

18. The tribunal indicates in the record of proceedings that the applicant had waived his right to an oral hearing, referring to the return of a REG2 form to this effect. However, the REG2 form dated 20 November 2018 in the tribunal file indicates that the applicant wished to have an oral hearing of his appeal. In January 2019 he had requested the postponement of a hearing due to ill health and this had been granted. On 29 March 2019 the appeal had been listed again for hearing, but was adjourned by the tribunal on the basis that there was insufficient time to hear the appeal. In the meantime, on 27 March 2019, the applicant indicated in a further pro forma that he was unable to attend the hearing and consented to the tribunal proceeding in his absence if it decided to do so. It appears that the hearing was postponed again on 7 May 2019 to enable the applicant to obtain his medical records as evidence. He then made written submissions on 24 June 2019 enclosing medical evidence.

19. As I understood there to be some inconsistency around the question of whether the applicant had waived the right to an oral hearing of his appeal, I directed some questions to him. The applicant responded to indicate that he had been given to understand that he could only postpone a hearing so many times and that, while he could not remember, he might have given permission for the tribunal to proceed if he could not attend. He indicated that he had received a notice of hearing, and that it had been his intention to attend the hearing but that his health conditions prevented this.

20. Among the tribunal papers, and consistent with the applicant's account, is page 3 of a document dated 27 March 2019 where at box 2b the applicant has ticked the following statement:

> "I am unable to come to the hearing and I consent to the Tribunal proceeding in my absence if it decides to do so".

21. The tribunal says at paragraph 3 of the statement of reasons:

> "3. The Tribunal noted the case history. In particular, the Tribunal noted that the Appellant had advised TAS through the return of the REG2 form that he was content to proceed with a paper hearing.

> 4. The Appellant did not indicate to TAS prior to the hearing that he changed his mind."

22. It further said:

> "7. As a consequence of his decision not to attend the hearing, the Tribunal did not have the benefit of being able to receive oral evidence from the Appellant himself on these conditions. The Tribunal bore in mind this fact in coming to its decision and therefore carefully scrutinised the documentary evidence before it to ensure it attached only appropriate weight to it, and did not attach undue weight to the fact of the absence of the Appellant. Nonetheless, the Tribunal reminded itself that it could not speculate as to the extent of imitation on the Appellant in respect of the activities identified".

23. I am troubled by some aspects of this. In particular the applicant recounts being informed that his appeal could only be postponed or adjourned so many times and that he changed his instructions to TAS in this context. However, there is no procedural rule limiting the number of postponements or adjournments that may occur in any case, and no "overriding objective" in the context of social security appeals that would necessarily imply one. Any encouragement to an appellant to waive his right to attend a hearing simply for administrative convenience would be inappropriate and procedurally unfair. I have not investigated this aspect fully and I do not advance any decided conclusion for or against the applicant for that reason.

24. However, from the form he signed, it is clear that the applicant gave a consent for the tribunal to proceed in his absence which was qualified by the words "if it decides to do so". I take the applicant's statement that he would have wanted to attend the hearing - but for his health conditions at the time - at face value. By these words he was not waiving his right to a hearing, but putting matters into the tribunal's hands.

25. For that reason, I am troubled by the tribunal's understanding of the circumstances. Rather than make a decision whether to proceed in the applicant's absence, it refers to the applicant's decision not to attend a hearing. This was not a case, as stated by the tribunal at paragraph 3 of the statement of reasons quoted above, where the applicant had advised TAS that he was content to proceed with a paper hearing. He had requested an oral hearing. He had revised that request by indicating that he was unable to come to the hearing, but effectively placed himself in the tribunal's hands as to whether they would proceed without him. This is not the same thing.

26. It may be that the tribunal has understood all the facts, but expressed itself inaccurately in the busy context of a tribunal session. However, it appears on the face of the record that it has not fully understood all the

circumstances and has specifically not given consideration to the question of whether it should have adjourned in the applicant's interests to permit him to attend at a different date. I consider that this undermines the fairness of the proceedings.

27. As it involves questions of fairness, I further consider that the materiality of the decision to proceed in absence - in terms of the likely outcome of the appeal – is not one that has to be addressed. I cannot speculate on the effect that the applicant's presence and his direct evidence might have had. The presence of procedural unfairness is sufficient to impugn the tribunal's decision.

28. I grant leave to appeal. I allow the appeal and set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal. That tribunal shall address the possibility of the applicant attending a reconvened hearing and shall proceed only in the light of the specific qualified consent he has given.

(signed): O Stockman

Commissioner

20 January 2021