GB-v-Department for Communities (DLA) [2022] NICom 36

Decision No: C2/22-23(DLA)

RE: (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 27 October 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 BE/6674/21/37/D.

2. For the reasons I give below, I grant leave to appeal. I allow the appeal under Article 15(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 who was aged 8 and a half years at the relevant date of decision. Through her appointee she claimed and was awarded disability living allowance (DLA) at the middle rate of the care component and the low rate of the mobility component by the Department for Communities (the Department) from 5 June 2017 to 1 June 2024 on the basis of needs arising from autistic spectrum disorder, attention deficit hyperactivity disorder, learning difficulties, constipation, and anxiety. The appointee submitted a DLA 434 claim form on 22 December 2020, which fell to be treated as a request for supersession. On 27 January 2021, the Department decided on the basis of all the evidence that there were no grounds to supersede the existing award and that the appellant continued to satisfy the conditions of entitlement to DLA at the middle rate care component and low rate mobility component from 26 November 2020 to 1

June 2024. The appointee requested a reconsideration of that decision and the decision was reconsidered by the Department but not revised. The appointee appealed. The appeal was late, but the Department admitted the late appeal.

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 27 October 2021 the tribunal disallowed the appeal, maintaining the award of middle rate care component and low rate mobility component to 1 June 2024. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 9 December 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 issued on 7 July 2022. On 26 July 2022 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The appellant submits that the tribunal has erred in law on the basis that:

(i) it failed to apply the relevant legal test for high rate care component;

(ii) it failed to give adequate weight to relevant evidence;

(iii) it reached irrational conclusions on the evidence;

(iv) it failed to resolve conflicts of facts or opinion;

(v) it failed to give adequate reasons.

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

7. The appellant responded to Mr Killeen's observations, engaging with a number of factual matters, submitting further evidence, and making submissions based on case law. Mr Killeen duly responded, indicating that he now supported the application.

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 supersession application and accompanying evidence, a detailed reconsideration request and the Departmental decisions. It had a submission from the appellant's representative, further had sight of extracts from the appellant's medical records, and a letter from the appointee to the tribunal. The

appointee attended the hearing and gave oral evidence, represented by Mr O'Hare. The Department was not represented. The issues in dispute were high rate care component on the basis of night-time needs and, if that was successful, high rate mobility on the basis of severe mental impairment and severe behavioural problems.

9. The tribunal considered the medical evidence and relevant reports and noted that a diagnosis of autistic spectrum disorder was made in 2017. A special educational needs report of January 2020 made reference to sleeping problems and indicated that melatonin had been prescribed. The evidence of the appointee was that the appellant would sleep a maximum of 2-3 hours per night and that she would attempt to leave the house. It was indicated that the appellant would be bathed at night to settle her pains from constipation. The appellant's grandparents, who took care of her in order to give the appointee respite, indicated sleep problems and soiling of bedsheets. The tribunal noted clinical references to the melatonin having resolved sleep issues and did not accept that night-time bathing would be regular. They did not consider that there was evidence that the appellant regularly needed nightclothes and sheets to be changed at night-time. As it did not accept that the conditions of entitlement for high rate care component had been satisfied, it found that she could not succeed in a claim for high rate mobility component.

Relevant legislation

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

(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.

11. The legislative basis of the mobility component is section 73 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (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—

…

(c) he falls within subsection (3) below;

…

(1A) In subsection (1) above “the relevant age” means—

(a) in relation to the conditions mentioned in paragraph (a), (ab), (b) or (c) of that subsection, the age of 3;

…

(b) In in relation to the conditions mentioned in paragraph (d) of that subsection, the age of 5.

(3) A person falls within this subsection if—

(a) he is severely mentally impaired; and

(b) he displays severe behavioural problems; and

(c) he satisfies both the conditions mentioned in section 72(1)(b) and (c) above.

…

(6) Regulations shall specify the cases which fall within subsection (3)(a) and (b) above.

…

12. By regulation 12 of the Social Security (Disability Living Allowance) Regulations (NI) 1992 (the DLA Regulations):

(5) A person falls within section 73(3)(a) (severely mentally impaired) if he suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning.

(6) A person falls within section 73(3)(b) (severe behavioural problems) if he exhibits disruptive behaviour which—

(a) is extreme;

(b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property; and

(c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake.

…

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 appellants 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. The appointee firstly submitted that the tribunal did not expressly consider all parts of the test for high rate care component and specifically that it did not consider whether someone needed to be awake at night for the purpose of watching over the appellant.

17. In his initial response, Mr Killeen for the Department submitted that the tribunal was aware of the relevant tests. He observed the legislative test and noted that the tribunal has said at paragraph 12 in the statement of reasons:

> *"12. … To be awarded the night-time component it must be demonstrated that the appellant requires prolonged or repeated attention from another person at night in connection with their bodily functions or else another person has to be awake at night for a prolonged period or at frequent intervals to watch over them to avoid substantial danger either to themselves or to others. Furthermore, the case of a child the tension [sic] or supervisory needs must be substantially in excess of the normal requirements of a child of the same age or else the child has substantial attention or supervision requirements with younger children without health issues may also have but which children at the same age in good health would not have."*

18. Mr Killeen submitted that it was implicitly clear that the tribunal did not accept the extent of the appellant's night-time needs outlined in the oral evidence or the additional written submissions of the appointee and the appellant's grandparents. He contended that the tribunal had sufficiently addressed the evidence before it as well as providing adequate reasons for its decision and submitted that the tribunal has not erred in law on this ground.

19. I agree with Mr Killeen that the tribunal was not required to state expressly that it had considered the relevant legislative tests. It has made reference to the statutory requirements of the appropriate test. A third party reading the statement of reasons can be satisfied that it has considered the relevant tests in reaching its decision.

20. The appointee further submitted that the tribunal gave insufficient weight to the evidence of night-time needs and in particular evidence of self-harm by the appellant. She submitted that the tribunal failed to give weight to a report of 28 October 2018 from the ADHD clinic on the basis that it was "some time before the decision". Mr Killeen responded, saying that he could not trace a letter of this date, but indicated that the tribunal in fact refers to a letter dated 28 October 2019 at paragraph 8 of the statement of reasons. Following the response of the appointee, he now accepts that there was also a letter before the tribunal dated 13 September 2018 that was typed on 20 October 2018.

21. The appointee submits the letter was only 3 months before the relevant decision. However, I observe that the appointee's supersession request was made in December 2020 and that the date of decision in this case is 27 January 2021. Therefore the letter of 28 October 2019 predated the decision by some 15 months and the letter of 13 September 2018 predated it by some 27 months. I further observe that the decision in the present case was made subsequent to a supersession request. In order for the pre-existing DLA decision to be changed, the appointee would require to establish grounds of supersession. One such ground might be relevant change of circumstances. However, the letters of 13 September 2019 and 28 October 2019 would not constitute relevant evidence in such a context. I further observe that the needs of a child aged 6 or 7 may be quite different from the needs of a child aged 8 and a half. The tribunal was entitled to take the age of the evidence into account when giving weight to it and I do not accept that an arguable error of law is identified on this basis.

22. The appointee generally submitted that the tribunal had failed to resolve conflicts of facts or opinion. A failure to resolve conflicts of fact or opinion would imply that the tribunal has seen – say – two pieces of conflicting evidence and has failed to decide between them. The appointee refers to the tribunal's rejection of evidence regarding the appellant needing a change of bedclothes or a bath at night. It found that evidence inherently improbable. However, that is not a failure to resolve conflicts of evidence. By its rejection of evidence the tribunal is resolving any conflict. What the appointee possibly means by this point is that the tribunal has not explained why it found the evidence improbable. However, the tribunal does not have to give reasons for its reasons. It simply found the evidence that the appointee would, on a regular basis, run a bath for a child who had been put to bed improbable.

23. The appointee further submits that the tribunal had not referred to all the evidence in the case and that it was not sufficient for it to say at paragraph 6 that it had considered all the documents. She submits that it does not

identify specific evidence at paragraph 13 that it has preferred over the appointee's oral evidence. However, the absence of a reference to particular alleged facts in medical records that might be expected to address them has probative weight. The tribunal indicates that claimed difficulties were not confirmed by clinician's letters. It indicates that it did not find support for particular claimed behaviours in the evidence. While *PH v Department for Communities* [2021] NI Com 7 is relied upon, this is not a case such as *PH* where the tribunal failed to make any reference to the medical evidence at all.

24. More generally, the appellant submits that the tribunal has not given "adequate weight" to the evidence. She has provided a "record of concern" from the appellant's primary school dated 9 September 2020 and refers to another dated 7 December 2020. The first of these documents was not before the tribunal and I do not consider that it is admissible before me. The second document was before the tribunal and indicates that the appellant was very tired at school, saying that "she's getting up early." Mr Killeen points out that the tribunal referred to the appointee's evidence that the appellant woke after a few hours, but states "we could not find support for this in the evidence elsewhere". Mr Killeen submits that it would appear that the tribunal has overlooked the evidence from the school that would indicate sleeping problems.

25. Generally, I consider that the weight to be given to evidence is a matter for the tribunal. It has the advantage of seeing and hearing witnesses directly and assessing their evidence in the light of the evidence as a whole. Here the tribunal observed that melatonin was introduced in January 2020 for sleep issues. The tribunal observed that a review in March 2020 indicated that this had been effective. On this basis, the tribunal found that the objective evidence did not support the appointee's account of substantial continuing sleep problems. Consequently, it did not accept the appointee's statements regarding the appellant's night-time sleeping pattern.

26. Mr Killeen addressed the decision of Chief Commissioner Mullan in *NH v Department for Communities* [2010] NI Com 29, which had been raised by the appointee. I note that, at paragraph 30-31, the Chief Commissioner indicated that he could not be satisfied that the tribunal had assessed particular evidence and as a result that it had erred in law. Mr Killeen accepted that the situation in the present case was similar, that the appointee had expressly raised the school "record of concern" in her appeal letter, and that the tribunal had not dealt with it expressly.

27. Mr Killeen pointed to general evidence that the appellant lacks awareness of danger and has high levels of impulsivity. I also observe that there are references in the medical records to the appellant head banging and to the appellant biting her own skin. While these are aspects of self-harm, the evidence did not indicate that the latter were particular problems at night. However, Mr Killeen submitted that the evidence indicating that the appellant was awake at night suggested a need for supervision due to danger to herself and others. In the light of the general evidence about the

appellant's lack of awareness of danger he resiled from his initial conclusions.

28. I accept the submission of the appointee and the acceptance by Mr Killeen for the Department that the tribunal failed to address the evidence from the school. I accept that the tribunal may have overlooked this evidence and that it was material evidence. The tribunal had found no objective evidence to support the appointee's account. Therefore, failure to consider this objectively supportive evidence was a possible factor in the tribunal's rejection of the statements that the appellant required night-time supervision. If I am wrong about this, and the tribunal was well aware of the evidence, I consider that it was required to deal with the particular evidence and explain why it did not accept it.

29. I consider that an arguable error of law arises. I grant leave to appeal. I allow the appeal under Article 15(8)(b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

22 November 2022