IB-v-Department for Communities (PIP) [2019] NICom 38

Decision No: C2/19-20(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 20 April 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 20 April 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 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 15 September 2017 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 14 June 2017. Following a request to that effect and the receipt of additional evidence, the decision dated 15 September 2017 was reconsidered on 8 November 2017 but was not changed. An appeal against the decision dated 15 September 2017 was received in the Department on 7 December 2017.

6. A supplementary submission dated 1 April 2018 was subsequently received in the Appeals Service (TAS). In his response, the decision maker noted that following the receipt, on 18 March 2018, of additional evidence, the decision dated 15 September 2017 was looked at again but was not changed. The additional evidence which had been submitted and a supplementary medical report, adduced by the Department, was forwarded to TAS for consideration by the appeal tribunal.

7. The oral hearing of the appeal took place on 20 April 2018. The appellant was present and was represented. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision dated 15 September 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 this descriptors were 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.

8. On 22 August 2018 an application for leave to appeal to the Social Security Commissioner was received in TAS. On 21 September 2018 the application for leave to appeal was refused by the Legally Qualified Panel member (LQPM).

Proceedings before the Social Security Commissioner

9. On 25 October 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. The appellant was represented in this application by Mr McAleese of the Citizens Advice organisation. On 20 November 2018 observations on the application were requested from Decision Making Services (DMS). In written observations dated 28 November 2018, Mr Hinton, for DMS, supported the application for leave to appeal. The written observations were shared with the appellant and Mr McAleese on 28 November 2018.

10. On 8 May 2019 I granted leave to appeal. When granting leave to appeal I gave as a reason that 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

11. 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?

12. 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;
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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

13. In the application for leave to appeal, the appellant set out the grounds of appeal:

> 'The documents considered are listed in the record of proceedings as including the Departmental submissions. In the submission dated 23rd January 2018 Tab 4 is a CAP1 report completed by the appellant's GP on 18th July 2018 which is supportive of the appellant's claims (copy attached). In her claim form Tab 3 pg 6 she had listed the

GP as a health professional best placed to advise on how her health conditions or disability affects her. In tab 5 Consultation report the Disability assessor lists the Capita report dated 18/07/17 as evidence considered alongside the consultation findings but makes no further reference to this report.

The reasons for decision note the GP report but fail to explain why this report was rejected in favour of the Disability Assessor report and the tribunal's own assessment of the GP notes and records.

It is submitted that this is a failure of natural justice either as this constitutes:

- Failing to give reasons or any adequate reasons for findings on material matters;
- Failing to take into account and/or resolve conflicts of fact or opinion on material matters.'

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

The CAP1 report refers to tabbed document 4 in the submission papers. The tribunal in its reasoning referred to the evidence placed before it as follows:

> *"… The Appellant provided consent to the release of her GP notes and records and these were available to the Tribunal on the day of the hearing. The Appellant also handed in an additional letter from Dr Douglas dated 24 April 2012. The Presenting Officer was in attendance on behalf of the Department. The Department's submission included the GP's report dated 18 July 2017 and the Client's personal emergency evacuation questionnaire and plan, a list of the Appellant's prescriptions. Her work adjustments email and support worker letter, a letter from the Appellant dated 18 October 2017, a letter from the National Autistic Society dated 18 October 2017, Spectrum Diagnostic Assessment and Therapy Centre factual report dated 24 April 2012 by consultant Douglas. The Tribunal considered all the available evidence in reaching its decision after the Department disallowing both components of PIP".*

The tribunal then assessed in detail the GP notes and records and related the evidence contained within these records to (the appellant's) medical conditions. With the exception of Asperger's syndrome the tribunal concluded that there was no significant cognitive or functional restrictions.

Regarding the evidence contained within the Health Care Professional's report the tribunal stated:

> *"In so far as there is any conflict in the available evidence the Tribunal preferred the report from the Health Care Professional dated 7 September 2017. The Tribunal accepted the conclusions as fair and reasonable and consistent with the GP notes and records as outlined above. The report was specifically directed at the conditions of entitlement for PIP and was the most relevant time wise to period being considered by the Tribunal. For these reasons the Tribunal preferred this evidence to that given by the Appellant".*

Regarding (the appellant's) written and oral evidence the tribunal concluded:

> *"The Tribunal accepted that the Appellant had medical conditions requiring ongoing review and treatment. However, in light of the available medical evidence and in particular the GP notes and records as detailed above, the Tribunal conclude that the Appellant overstated the impact of these conditions on her functional ability".*

Therefore it would appear from the above statements that the tribunal provided sound reasoning as to why it preferred the evidence contained within the Health Care Professional's report and the GP notes and records to arrive at the conclusions it did. However, I would contend that the tribunal should have considered in greater detail the evidence presented in the GP report dated 18 July 2017 (tabbed document 4). I would contend the GP's findings in this report might indicate possible entitlement in respect of the activity of planning and following a journey. The GP in this report referred to (the appellant) having difficulty coping with new people and places. It also stated that she would have frequent panic attacks when out on her own or in a new environment.

The tribunal in its reasoning with regards to the activity of planning and following a journey concluded thus:

> *"The Appellant and her representative clarified at the outset of the hearing was in relation to pre-planning a route to an unfamiliar place. The Appellant in her questionnaire indicated that she never goes to new places alone due to anxiety. The Appellant in her oral evidence confirmed that she was able to go somewhere familiar for coffee and to arrange these meetings by herself. She had attended another church 2 years ago but due to having panic attacks and being unable to cope with light noise she had not returned. To go to unfamiliar*

places she would pre-plan the journey and she gave evidence that she refused to go to unfamiliar places if she wasn't able to plan it. Tribunal considered the degree of limitation reported by the Appellant was not corroborated by the GP notes and records. The Tribunal noted that the Appellant could undertake an unfamiliar journey if it was pre-planned and is able to drive to and from work unaccompanied on a majority of days and complete food shopping without difficulty. The Tribunal accepted the conclusions of the health care professional as detailed at page 20 of the report dated 7 September 2017. Accordingly the Tribunal found that the Appellant could plane [sic] and follow the route of a journey unaided and safely, to an acceptable standard, repeatedly and within a reasonable time frame. The Tribunal considered that the Appellant did not fall into the remit of the descriptor in this activity".

Two aspects of the tribunal's reasoning here would give me cause for concern. The first concerns its conclusions regarding (the appellant's) ability to pre-plan a journey. The tribunal stated that she could undertake a journey if it was pre-planned. It is true that (the appellant) stated at the hearing that she "could figure it out" in response to the medical member's question if she didn't have help. However, in response to the question if she could go on her own, (the appellant) answered, "refused, as was unable to plan". Therefore, it has not been made clear if (the appellant) was able to pre-plan on unfamiliar routes the majority of the time. I would contend the onus was on the tribunal to explore with (the appellant) in greater detail why she refused to pre-plan; was this out of choice or due to severe anxiety or distress? I would contend the tribunal has failed in its inquisitorial role in this respect.

The second aspect concerns the tribunal's statement that "it accepted the conclusions of the health care professional as detailed on page 20 of the report date 7 September 2017". I have considered the Health Care Professional's comments here with regards to this activity and would contend that she has failed to assess (the appellant's) ability to undertake an unfamiliar journey. I reproduce her analysis as follows:

"The CQ and FH indicates that she never goes to new places alone due to anxiety.

The HOC reports no specialist input for her mental health condition, the MSE was unremarkable and the SOH indicates she is able to drive to and from work unaccompanied on a majority of days and complete food shopping in a large supermarket without difficulty.

Therefore it is likely she can plan and follow the route of a journey unaided and to an acceptable standard".

The above statement in my view is confined to assessing (the appellant's) ability to undertake familiar journeys but does not go on to address any difficulties encountered with unfamiliar journeys. I have shown above that the tribunal's conclusions regarding unfamiliar journeys were inadequate. I would contend that by accepting the conclusions of the Health Care Professional its reasoning is inadequate and does not address other descriptors with regards to this activity. I would also point out that (the appellant) in her self-assessment form (tabbed document 3) stated she did not need help from another person to plan and follow a route to somewhere she knew well; however she stated she needed help getting to somewhere she did not know well.

I would refer to an unreported NI Commissioner's decision C16/08-09(DLA) in which the then Commissioner Mullan dealt with the tribunal's role in assessing evidence. Commissioner Mullan emphasised that the assessment of evidence was a matter for the tribunal and referred in detail to the Court of Appeal decision *Quinn v Department for Social Development [2004] NICA 22.* This held that the weight given to any evidence is completely a matter for the tribunal and a Social Security Commissioner could disturb it *"only if that conclusion as to weight is one which no reasonable tribunal could have reached".* However, the Commissioner then went on to stare in paragraphs 54 and 55 of his decision:

> *"Nonetheless, 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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> *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. 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.'"*

Consequently in line with the above observations and quoted case law I would contend the tribunal failed to resolve satisfactorily the conflict of evidence presented in the GP factual report and that presented in the Health Care Professional's report and the GP notes and records. Therefore, I would contend it has erred in law this respect.'

15. I accept Mr Hinton's careful analysis and, for the reasons which have been set out by him, agree that the decision of the appeal tribunal is in error of law.

Disposal

16. The decision of the appeal tribunal dated 20 April 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.

17. 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 15 September 2017, which decided that the appellant was not entitled to PIP from and including 14 June 2017;

    (ii) 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

    (iii) 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

10 July 2019