SR-v-Department for Communities (DLA) [2019] NICom 67

Decision No: C5/19-20(DLA)

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 30 April 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Craigavon.

2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

3. The applicant claimed disability living allowance (DLA) from the Department for Social Development, now known as the Department for Communities (the Department), from 20 November 2015 on the basis of needs arising from depression. The Department obtained a report from the applicant's general practitioner (GP) on 25 January 2016. On 26 January 2016 the Department decided on the basis of all the evidence that the applicant did not satisfy the conditions of entitlement to DLA from and including 20 November 2015. The applicant appealed.

4. The appeal was initially determined on 24 October 2016. However, the decision of the appeal tribunal was set aside by Chief Commissioner Mullan in a decision of 20 November 2017 on grounds of procedural fairness. He referred the appeal to a newly constituted tribunal for determination.

5. 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 30 April 2018 the tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 28 September 2018. 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 3 December 2018. On 17 December 2018 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The applicant, represented by Mr McCloskey of Law Centre NI, submits that the tribunal has erred in law on the basis that:

   (i) it failed to make sufficient relevant findings of fact;

   (ii) it failed to address conflicts on material matters;

   (iii) it made irrational findings on the evidence;

   (iv) it failed to record the evidence it had considered.

7. The Department was invited to make observations on the applicant's grounds. Mr Arthurs of Decision Making Services (DMS) responded on behalf of the Department. Mr Arthurs submitted that the tribunal had erred in law, submitting that the tribunal failed to make sufficient enquiry into the aspect of panic attacks. He indicated that the Department 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 from the first tribunal, consisting of the Department's submission, containing the DLA claim form and a factual report from the applicant's GP, together with the first tribunal decision and the Commissioner's decision. It further had sight of the applicant's medical records. Added to this was a submission from the applicant's representative, along with various reports relating to employment and support allowance, and letters or reports from the applicant's nurse practitioner, husband and physiotherapist. The applicant attended the appeal hearing, represented by Ms Coulter, and gave oral evidence. The Department did not attend.

9. The tribunal noted the evidence confirming that the applicant suffers from depression, anxiety, poor sleep and panic attacks. It found that the applicant did not claim from a physical perspective that she could not perform the activities of daily living, but rather that from a mental health perspective she required encouragement and motivation, supervision and guidance with a variety of daily personal care activities. The tribunal

found the applicant's evidence exaggerated and did not accept that she was credible, noting that her GP reported "no known problems" in relation to self-care.

10. The tribunal found that mobility problems were not claimed due to physical needs, but due to mental health. It accepted that she was suffering from significant mental health illness, but found that the applicant's evidence was exaggerated and lacking in credibility and did not accept that she had a reasonable need for guidance for supervision to enable her to walk out of doors most of the time on unfamiliar routes.

Relevant legislation

11. The legislative basis 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) he is so severely disabled physically or mentally that—
>
> (i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or
>
> (ii) he cannot prepare a cooked main meal for himself if he has the ingredients;
>
> (b) he is so severely disabled physically or mentally that, by day, he requires from another person—
>
> (i) frequent attention throughout the day in connection with his bodily functions; or
>
> (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or
>
> (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.

(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.

The legislative basis of the mobility component is section 73 of the same 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—

(a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so;

(ab) he falls within subsection (2) below;

(b) he does not fall within that subsection but does fall within subsection (2) below;

> (c) he falls within subsection (3) below; or
>
> (d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time.
> …

Hearing

12. I directed an oral hearing. Mr McCloskey of Law Centre NI appeared for the applicant and Mr Arthurs of DMS appeared for the Department. I am grateful to the representatives for their assistance.

13. Mr McCloskey's principal submission was to the effect that the tribunal had failed to make sufficient findings in relation to panic attacks. He placed reliance on a decision of Upper Tribunal Judge Lane in *ES v Secretary of State for Work and Pensions* [2009] UKUT 6. She had said:

> 10.…the tribunal must find sufficient facts to support its decision and in doing so, show how it resolved factual disputes. This requires an explanation of the merits of the evidence so that the parties can understand why the evidence was accepted or rejected.
>
> 11. Establishing the facts is not the same the same as reciting the evidence. What is necessary is an indication, express or by necessary implication, of what the tribunal accepted as fact. The Upper Tribunal may not be astute to find implicit that which has been left unstated.

14. Mr McCloskey acknowledged that the applicant's counsellor had reported that the applicant could negotiate her way to and from unfamiliar surroundings without guidance and supervision from another person most of the time. However, he submitted that the risk of a panic attack was a constant factor. He submitted that the tribunal was under an obligation to investigate the likely cause, frequency and consequence of these attacks, but failed to do so.

15. Mr McCloskey further submitted that the tribunal had erred by failing to resolve conflicts between the GP factual report and an ESA113 form completed by a GP which referred to panic attacks and social avoidance. However, it transpired that the ESA113 was not before the tribunal. The reference to the ESA113 was essentially an indirect one made in an ESA85 report.

16. Mr McCloskey submitted that a further significant issue arising was the tribunal's treatment of the evidence in a GP factual report. He submitted that, when it was put to her that the GP reported no known problems regarding self-care and mobility, she had said that the GP "would not have known me". Mr McCloskey submitted that the tribunal had not resolved the conflict arising and had not given sufficient reasons for its approach to the GP evidence.

17. Mr Arthurs maintained the Department's position that the tribunal was obliged to investigate the matter of panic attacks and to make reference to the likely frequency of the claimed attacks. Otherwise he did not accept that the grounds relied upon by Mr McCloskey were made out.

18. Mr Arthurs referred me to the decision of Mrs Commissioner Brown in C23/02-03(DLA) which indicated that a GP completing a factual report would have access to the patient's medical records and that there was no requirement that they should have prior knowledge of the patient.

Assessment

19. On the basis that the Department has accepted that the tribunal arguably erred in law on one of the grounds she advances, I grant leave to appeal.

20. Mr McCloskey's principal submission was to the effect that the tribunal had failed to make sufficient findings in relation to panic attacks. The applicant described symptoms of heightened anxiety when walking out of doors, which were apparently referred to as "panic attacks" in an ESA113 referenced in an ESA85 report some three months before the decision date. The ESA85 report led to her being placed in the support group for employment and support allowance (ESA) purposes, indicating a significant level of need. Mr McCloskey submitted that the tribunal had not addressed the frequency of these panic attacks and their impact on the applicant. He placed reliance on the decision of Upper Tribunal Judge Lane in *ES v Secretary of State for Work and Pensions* [2009] UKUT 6.

21. In the same decision, Judge Lane had cited Lord Brown of Eaton-under-Heywood in *South Bucks D.C. v Porter (No. 2)* 2004 UKHL 33, [2004] 1WLR 1953 when he said of reasons that "they must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. The reasons need refer only to the main issues in the dispute, not to every material consideration".

22. On the issue of panic attacks, the tribunal had elicited evidence from the applicant that she needed someone in the car with her when driving and that she was having 4-5 panic attacks per week. She said that her symptoms were tightness in the chest and in terms of duration it took up to an hour to recover from one. The applicant stated that her counsellor

knew that she was having panic attacks but did not give her advice regarding panic attacks. When it was put to her that the GP completing a factual report reported no known problems regarding self-care and mobility, she had said that the GP "would not have known me".

23. As indicated above, the ESA113 that was said to refer to panic attacks was not actually before the tribunal. The ESA85 reference to an unseen document means that it could not be given particularly great weight, it seems to me. Nevertheless, the tribunal observed that the ESA evidence generally supported the submission that the applicant had disabling functional restrictions. On the other hand, it considered this in the light of the GP factual report and the applicant's evidence at hearing.

24. It noted the GP's statement that she had "no known problems" with getting around. It also noted the statement in the psychotherapist's report that she was capable of negotiating her way to and from unfamiliar surroundings without guidance and supervision from another person most of the time. It found that she most probably engaged in limited driving alone at the time of the decision. It reported that it found her evidence at hearing to be exaggerated and lacking in credibility, giving the example of her statement to the tribunal that she needed encouragement to go to the bathroom.

25. Mr McCloskey submitted that the tribunal's finding conflicted with other evidence before the tribunal, such as a written statement by the applicant's husband and the GP records. As indicated above, he placed reliance on extracts from the evidence relating to the applicant's ESA claim that supported the existence of panic attacks and functional restrictions.

26. Mr Arthurs offered support on the basis that the tribunal had not made enquiries as to the frequency of the panic attacks and the facts that led to them. However, in fact, the tribunal had obtained evidence on their frequency and duration from the applicant. At the same time, it had evidence from a GP that there were no known problems with getting around and evidence from a psychotherapist that the applicant was capable of negotiating her way to and from unfamiliar surroundings. It found the evidence of the applicant about her care needs to be exaggerated and lacking in credibility. Against this background, it does not appear to me that a failure to probe the applicant as to the cause of her panic attacks would amount to an error in law.

27. It is plain to someone reading the decisions that the tribunal preferred the evidence in the GP factual report and the psychotherapist's report, coupled with what it judged to be the implausibility of some of the applicant's evidence regarding care needs. I consider that it made clear findings as to which evidence was preferred and that its reasons explain the decision it reached. I consider that it was entitled to reach that conclusion on the evidence.

28. I observe that in C23/02-03(DLA) the tribunal had not dealt with the applicant's complaint about the GP's report by putting matters for comment. However, the medical member in this case had put the GP's comments to the applicant for comment. Therefore, the error of law that appeared in that case was not repeated here.

29. Mr Arthurs referred me to my decision in *NMcA-v-Department for Social Development* [2015] NI Com 20, which turned on a question of procedural fairness. While referencing the decision of Mrs Commissioner Jupp in *CDLA/4580/2003,* I expressed concern that tribunals should not equate a comment by a doctor to the effect that any functional limitation on mobility and self-care was "not known" to a statement that the claimant had no such limitation.

30. The factual report was completed by a GP in the applicant's practice who, the applicant said, would not have known her. The GP in the factual report responded to the question "Please give details, if known, of the effects of the disabling condition(s) on day to day life" by saying "No known problems" in relation to self-care, insight and awareness of danger and ability to get around. Mr McCloskey submitted that this could have been taken wrongly by the tribunal to mean that the applicant had no problems. As Mrs Commissioner Jupp said:

> 11. I accept that it is clear that the tribunal interpreted the general practitioner's statement that he did not know what distance the claimant could walk before the onset of severe discomfort as meaning that the claimant did not have any difficulty with walking; what I do not accept is that the tribunal was right to make this interpretation. Although it is an interpretation often made, it is without justification. If a doctor cannot confirm that a patient has no walking problems, this raises an equal possibility that the claimant may have such problems. A tribunal should not conclude that general practitioners know a patient's overall condition, and would indicate if there were any problem. In many circumstances, the general practitioner completing the enquiry form may not know the claimant personally, and have no information from the patient's papers on which to base an opinion. In this case the claimant confirmed she knew the general practitioner "fairly well" according to the Record of Proceedings, yet he dealt only with her angina (see paragraph 14 below).

31. Mr McCloskey submits that the particular medical practice had problems with staffing and has now closed. I have no knowledge of that and I cannot take evidence from the applicant's representative as to this circumstance.

32. I have some reservations as to whether the tribunal was unduly influenced by the GP factual report, but I am satisfied the circumstances

in which it was considered were not procedurally unfair. Moreover, I am also cognisant that the tribunal had the opportunity to see the applicant and to hear her evidence and that the lack of credibility in her direct evidence, as well as the psychotherapist's report, was relied upon by the tribunal in addition to the GP report.

33. I am satisfied on balance that the tribunal had sufficient evidence to decide the proceedings, that the proceedings were fair, that its reasons are clear and that it has not reached an irrational decision. I conclude that the tribunal has not materially erred in law and I disallow the appeal.

(signed): O Stockman

Commissioner

30 October 2019