EN-v-Department for Communities (PIP) [2019] NICom 74

Decision No: C12/18-19(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 27 June 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 27 June 2017 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 (MQPM) 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 17 November 2016 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 25 July 2016. Following a request to that effect, the receipt of additional information, and the obtaining by the Department of 'supplementary advice', the decision dated 17 November 2016 was reconsidered on 6 January 2017 but was not changed. An appeal against the decision dated 17 November 2016 was received in the Department on 12 January 2017. The appellant was represented in the appeal by the Wave Trauma Centre.

6. Following an earlier postponement at the request of the appellant and an adjournment in order to obtain General Practitioner (GP) records, the substantive oral hearing of the appeal took place on 27 June 2017. The appellant was present and was represented by Ms McCaughey of the Wave Trauma Centre. There was no Departmental Presenting Officer present. The appeal tribunal allowed the appeal in part making an award of entitlement to the standard rate of the mobility component of PIP for the fixed period from 14 December 2016 to 13 December 2018 but disallowing entitlement to the daily living component of PIP.

7. On 2 October 2017 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). The appellant was represented in the application by Mrs Carty of the Law Centre (Northern Ireland). On 25 October 2017, the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 24 November 2017 a further application for leave to appeal was received in the Office of the Social Security Commissioners. The appellant was, once again, represented in the application by Mrs Carty. On 9 January 2018 observations on the application were requested from Decision Making Services (DMS). In written observations dated 8 February 2018, Mrs Coulter, for DMS, supported the application for leave to appeal on two of the grounds advanced on behalf of the appellant.

9. The written observations were shared with the appellant and Mrs Carty on 9 February 2018. Written observations in reply were received from the Law Centre on 9 March 2018. In these observations in reply, Ms Boland, acting as the new representative from the Law Centre, asked whether the report of a medical examination of the appellant by a healthcare professional as part of the Departmental decision-making process had been audited. The written observations were shared with Mrs Coulter on 14 March 2018. In further correspondence dated 26 March 2018, Mrs Coulter confirmed that the relevant report had not been

the subject of the audit process. The correspondence of 26 March 2018 was shared with the appellant and the Law Centre on 10 April 2018.

10. On 20 September 2018 I granted leave to appeal. When granting leave to appeal I gave as a reason that the grounds of appeal were arguable. At this time I was also dealing with an appeal which raised legal issues which were parallel to those in the instant case and I determined that, as a consequence, this appeal should be listed for oral hearing on the same date as the other appeal.

11. The appeal was first listed for oral hearing on 23 October 2018. On 24 September 2018 an application for postponement of the oral hearing was received from Mr McCloskey. The postponement application was granted by me on the same date. The appeal was re-listed for oral hearing on 6 November 2018 but had to be postponed again due to an unexpected judicial commitment on my part on the same date.

12. The substantive oral hearing of the appeal took place on 4 December 2018. The appellant was not present but was represented by Mr McCloskey. The Department was represented by Mr Arthurs. Gratitude is extended to both representatives for their detailed and constructive observations, comments and suggestions.

Errors of law

13. 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?

14. 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;
>
> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> (iv) giving weight to immaterial matters;
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> (v) making a material misdirection of law on any material matter;

(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."

The submissions of the parties

15. In the Case Summary prepared for the oral hearing of the appeal, Mr McCloskey raised the following grounds of appeal:

'**First ground of appeal - Failure to provide adequate reasons not explicitly address conflicts in the evidence**

It is submitted that the tribunal has erred as it failed to give adequate reasons as to why it determined that the appellant could follow the route of a familiar journey without another person.

In its decision it is submitted that the tribunal failed to explicitly address conflicts in the evidence. The reasons state:

"The panel considered whether an award would be appropriate under number 1f and whether (the appellant) would be unable to follow the route of a familiar journey without another person. The panel took into account the level of medical management and in particular noted the level of medication which (the appellant) had been prescribed and the lack of recent mental health input. The panel noted that (the appellant) had no cognitive or intellectual impairment. While we were aware of his vigilance as a result of a previous attack we were satisfied that (the appellant) was not so severely disabled from a mental health perspective that he would be unable to undertake the route of a familiar journey without another person for these reasons we did not make an award under Activity 11 f."

> *"The panel was satisfied that given (the appellant's) mental health history and his level of medication that although he has some mental health issues he would be able to prepare and cook a simple meal unaided. We noted in particular that his cognition and intellect were intact."*
>
> *"We did not find that his mental health condition was so severe that he received support to engage in social situations but we were satisfied that (the appellant) would require a degree of prompting. This again is based on the medical evidence and the lack specialist* [sic] *input in (the appellant's) case"*

The GP letter at Tab 8 and dated 29 September 2015 states:

He is unable to get to a particular place which he does not know unless he is accompanied by a friend or relative. Indeed he will often need have [sic] *supervision when leaving the house.*

He will also find it impossible to engage socially with someone who he does not know well. If required to do this in a particular social setting then he will not attend, as there will be a very significant degree of stress and anxiety.

The GP letter at Tab 4 dated 4 October 2016 and prior to assessment advises that the appellant greatly suffers from anxiety and depression and it has worsened in the previous few weeks following the death of his father. His concentration is not good, and his mood is very low at times.

There is an ESA85 report from 8 September 2018 which provides conflicting clinical findings and indicates the appellant cannot get to a specified place with which he is familiar, without being accompanied by another person and that engagement in social contact with someone unfamiliar is not possible for the majority of time.

It is submitted that this evidence is in conflict with the tribunal findings and that the tribunal were under an obligation to explicitly address this conflicting medical evidence.

As an additional point we wish to highlight that the tribunal's consideration of toileting needs may have been inadequate. The tribunal stated:

We noted the claim for incontinence but took into account the fact that (the appellant) has had no assistance from incontinence services and has only recently mentioned this issue to his doctor and we were satisfied that any incontinence which he has he would be able to attend to independently himself.

At the date of appeal it was factually incorrect to state that (the appellant) had only recently mentioned the incontinence to his GP. In conflict with this finding is the GP letter dated 4 October 2016 which advises of *inflammatory bowel disease under care of the gastroenterologist* and the documentation of *incontinence* which can be *very difficult if he is out of the house*. In addition DfC had specifically referred to the incontinence issue when seeking further input from Capita on 4 January 2017.

Even if the tribunal explicitly addressed this conflict in their finding that he can cope independently with incontinence it is arguable that a tribunal should give thought to the reasonableness of the use of incontinence aids for someone who is incontinent in order to independently manage this condition.

Second ground of appeal - The tribunal misdirected itself in relation to the law.

It is unclear given the failure to explicitly address the alternative medical evidence if the tribunal have correctly applied the legal definition of social support in relation to Activity 9.

A number of decision in GB have considered the difference between prompting and social support in relation to Activity 9 with SSWP v MMcK [2017] CSIH 57 providing a summary. As there is potential overlap between prompting and social support and because of the evidence from multiple sources of the need for actual accompaniment it is submitted that the tribunal has misdirected itself in relation to this matter. In the alternative the tribunal has failed to provide adequate reasons to explain why the appellant required prompting but not social support.

Third Ground of Appeal - The tribunal erred in its inquisitorial duty in relation to the weighing of the evidence provided by the disability assessor.

The face to face assessment in this case took place on 17 October 2016. It is documented that the assessment lasted 40 minutes. It is further documented that the report was completed 4 days later on 21 October 2018. The tribunal have not investigated if this delay would make any material difference to the weighing of the evidence.

At the time of the appeal DfC and Capita were not disclosing if a report had been audited or amended. As a result enquiries arose out of the fact that there was a delay in the completion of the assessments as this would also occur in cases that had been audited for quality issues. Subsequently in NI policy was changed by DfC and Capita to ensure all appeal papers should indicate if a face to face assessment has undergone audit, and if so the audit report and each version of the report should be included in the papers. This policy has not changed in GB and appellants, decision makers and tribunals in GB are not informed if a report has been audited, and amended as a result of quality concerns. Only the final version of the report is made available.

We continue to believe that delays in the completion of reports may be relevant to the weighing of evidence. Law Centre NI has been informed by DfC that Capita are unable to identify from the software when each part of the report is completed. Contemporaneous sections are expected to be completed during the assessment but it has been confirmed that prior to submission any part of the report can be amended and there will be no record. Unlike Atos ESA assessments, Capita has no requirement that PIP reports are completed on the day of an assessment. In this case there is an unexplained 4 day delay between the face to face assessment and the completion of the report. Capita are unable to provide a specific explanation regarding this delay in this or any case as they do not record this information.

With the benefit of hindsight and the information provided by DfC on 26 March 2018 we now know that the assessment in this case did not undergo audit. We do not know however why there was a 4 day delay in the completion of the assessment. When comparing conflicting evidence, and in particular two face to face assessments commissioned by DfC this may have been a

material matter in attributing weight to the PIP assessment.

(The appellant) brought his GP letter of 4 October 2016 to the assessment. It is policy that evidence brought to an assessment is returned to the claimant and they are advised to send this by post. Therefore when the assessment was completed 4 days later the disability assessor would have had to rely on memory of the content of this letter should she wish to address conflicts with this alternative evidence when giving the justification for descriptor choices.'

16. The Case Summary which had been prepared by Mrs Coulter for DMS was based on the submissions which had been made on behalf of the appellant by Mrs Carty in the application for leave to appeal. Mrs Coulter made the following submissions:

'**Issue 1**

Mrs Carty states the tribunal failed to deal with evidence before it concerning mobility activity 1 and erred in its award of descriptor 1(e). The tribunal had sight of an ESA health care professional's report stating (the appellant) had been awarded 9 points for Activity 15(b) (is unable to get to a specified place with which the claimant is familiar without being accompanied by another person) and therefore evidence of a potential award for descriptor 1(f). I contend that while PIP and ESA are different benefits with different rules of entitlement, evidence relating to ESA may be supportive of a claim to PIP and vice versa. Furthermore, as the ESA report was completed within a month or two before (the appellant's) claim for PIP, it could have been relevant to the circumstances at the date of his appeal. I therefore submit that not dealing with this evidence, the tribunal has erred in law.

It is further contended that the tribunal has not provided adequate reasoning for its failure to award points under daily living activity 1(d) or (e). Mrs Carty states there is evidence from the DA to show that the appellant was observed constantly trembling and this is relevant to his ability to prepare and cook food. The weight of any evidence is a matter for the tribunal (R3/04 (DLA)) and the tribunal had the benefit of (the appellant's) GP notes and records as well as the DA report. In its reasons for decision the tribunal noted its consideration of Regulation 4 and 7 of the Personal Independence Payment Regulations (NI) 2016, therefore it is evident the tribunal

considered (the appellant's) ability to carry out this activity safely, repeatedly, in an acceptable manner and in a reasonable timeframe. The tribunal would have been aware of the tremor in his hands but found there was no difficulty in preparing food.

Issue 2

Mrs Carty contends there was evidence from the HCP report (in relation to ESA) and GP relevant to an award of activity 9(c) (needs social support to engage with other people). I accept the tribunal has not made specific reference to the ESA report in its reasoning, however, in the record of proceedings, the tribunal noted it referred to the employment and allowance decision and therefore this evidence formed part of its deliberations. However, I would submit that while the tribunal has carefully assessed all the evidence, it has erred in law by failing to provide adequate findings on the evidence contained within the ESA report in considering mobility descriptor 1(f) and daily living activity 9 (c).

Issue 3

A tribunal cannot take into account circumstances which are not obtaining at the date of decision under appeal in accordance with article 13(8)(b) of the Social Security (NI) Order 1998), paragraph 7 of C24/03-04(DLA) also refers. Mrs Carty contends the tribunal's reference to a lack of recent mental health input was an assessment of evidence not relevant to the appeal under dispute. I submit the tribunal considered all the evidence within the submission and recorded in the reasons for decision that (the appellant) had been under the care of the mental health team. It awarded 10 points under descriptor 1(d), however as outlined in issue 1, I would contend that the tribunal failed to provide adequate reasoning on this matter given the evidence presented before it in the ESA medical report. In respect of daily living activity 9, upon perusal of the entire transcript of proceedings, I would contend that the tribunal has accepted (the appellant) has difficulties engaging with others resulting from an incident in 2014, and has considered the impact of his mental health condition on his ability to carry out this activity. I contend its reasoning is arguably sustainable on the evidence before it, however, its failure to reference, albeit briefly the findings of the ESA medical report which concluded the appellant required social support to mix well with others, renders its decision erroneous in law.

Issue 4

Mrs Carty states the tribunal did not provide adequate reasoning on how it weighed the evidence of the DA report and that it was completed 4 days after (the appellant) was examined. It is my submission that the tribunal has not erred in law as contended. The tribunal has clearly considered the DA report as well as other evidence which included the GP notes and records and reached the conclusion that (the appellant's) mental health was not so severe as contended by him.

Regarding the issue of delay of the DA report I would submit that this in itself would not amount to an error in law. There may be many reasons as to why a report is not completed straight after an examination, such as workloads and working patterns to name but a few. With regards to the auditing of reports I have been advised that all responses from Capita will now include whether a report has been audited and if so, all Capita documentation and copies of previous reports are sent to the Department. In addition to this, I have attached a copy of the audit process explanatory note which now goes into each appeal where the assessment has been audited.'

Analysis

17. As was noted above, as part of the Departmental decision-making process, and following notification of the adverse PIP entitlement decision of 17 November 2016, Ms McCaughey made an application on behalf of the appellant for the decision to be looked at again. In her application, Ms McCaughey noted that in connection with a claim to Employment and Support Allowance (ESA), the appellant had been the subject of assessment on 8 September 2016 by a healthcare professional. Ms McCaughey attached extracts from the report of the ESA assessment, highlighted three descriptors which the ESA healthcare professional had applied and submitted that this evidence was relevant to the application for a reconsideration of the adverse PIP entitlement decision.

18. All of the materials and evidence relevant to the ESA assessment which Ms McCaughey had submitted to the Department were included in the appeal submission prepared for the oral hearing of the PIP appeal. It is the case, therefore, that the appeal tribunal had access to those materials and evidence.

19. In the record of proceedings for the appeal tribunal hearing, there is a reference by the MQPM to the appellant's 'Employment and Support Allowance decision.' Although I cannot be certain, this may be a

reference to a decision notice of an appeal tribunal, with accompanying 'score sheet' dated 14 March 2017, which was handed in to the adjourned appeal tribunal hearing on 25 April 2017.

20. In the statement of reasons for the appeal tribunal's decision in respect of both the daily living and mobility components of PIP, there is no reference whatsoever to the ESA materials and evidence which had been submitted to the Department on behalf of the appellant by Ms McCaughey as part of the reconsideration process. Further, there is also no reference to the decision notice of an appeal tribunal, with accompanying 'score sheet' dated 14 March 2017, which was handed in to the adjourned appeal tribunal hearing on 25 April 2017.

21. It is axiomatic that ESA and PIP are two separate social security benefits with different rules of entitlement. It is equally clear, however, that claimants before the Department and appellants before appeal tribunals are entitled to adduce any evidence they wish in connection with their claim or appeal. It is easy to understand why a claimant or appellant, who has been successful in a claim or appeal in connection with one social security benefit, where the impact of a medical condition on an ability to function has been accepted, might wish to adduce that evidence in support of a claim or appeal where it is perceived that the issue of impact of a medical condition on ability to function is parallel. I have noted, for example, that it appears to be Departmental policy, in connection with claims to PIP where there has been a previous entitlement to DLA, to ask the claimant whether he/she wishes the evidence which was obtained in connection with the DLA award to be made available to the decision maker in connection with the PIP claim.

22. Once before the appeal tribunal, the tribunal is obliged to weigh and assess that evidence and, most significantly, determine its relevance to the issues arising in the instant appeal. I accept that evidence obtained in connection with an ESA claim or appeal *may* have a relevance in connection with a PIP claim or appeal. The emphasis here should be noted. That is, however, for the primary fact-finding and decision-making authorities, including appeal tribunals, to determine. Having considered the 'other benefit' evidence, the appeal tribunal may determine that it has no relevance to the issues arising in the appeal which is before it, because, for example, it is too remote in time from the date of the decision under appeal. Equally, however, the appeal tribunal may determine that it does have relevance.

23. In the instant case, the failure of the appeal tribunal to refer to the ESA-related materials and evidence in the statement of reasons for its decision suggests that it has failed to consider its relevance. For that reason, I agree that the decision of the appeal tribunal is in error of law and I set it aside.

24. Having found, for the reasons which are set out above, that the decision of the appeal tribunal is in error of law, I do not have to consider the other

grounds of appeal. There is one matter, however, which I wish to address. As was noted above, this appeal was listed for oral hearing together with another appeal. At the time of listing, it was thought that a significant issue which arose in the other appeal was also of relevance in this one. The issue was the effect of an 'audit' process on the assessment of evidence by an appeal tribunal in appeals involving entitlement to PIP. That issue has now been addressed in detail in my decision in *MP-v-Department for Communities (PIP)* ([2019] NICom 55 ('*MP*')). As was noted above, Mr McCloskey has now conceded that in the instant case the 'audit' issue was not relevant as certain of the evidence giving rise to the decision under appeal was not subject to an 'audit' process.

25. Mr McCloskey has also noted, however, that in this case there was a four-day delay between the 'face to face assessment' undertaken by the appellant on 17 October 2016 and the completion of the report of that assessment on 21 October 2016. Mr McCloskey submitted that 'when comparing conflicting evidence, and in particular two face to face assessments commissioned by DfC this may have been a material matter in attributing weight to the PIP assessment'.

26. In paragraph 77 of *MP*, I said the following:

> 'Mr McCloskey raised the issue of delay and its effect on the weight to be attached to an assessor's report in the following context. He noted that it is often the case that an assessor's report is completed and signed on a date different to that on which the examination or face-to-face consultation took place. The delay in the completion of the report may be enhanced when the report is subject to the audit process. I agree with Mr McCloskey that this has the potential to be a factor to be taken account of when assessing the weight to be given to an individual report but much will turn on the individual circumstances of a case.'

Disposal

27. The decision of the appeal tribunal dated 27 June 2017 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.

28. 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 17 November 2016 in which a decision maker of the Department decided that the appellant was not entitled to the either component of PIP from and including 25 July 2016;

(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 Disability Living Allowance 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

19 November 2019