FS-v-Department for Communities (PIP) [2020] NICom 35

Decision No: C3/20-21(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 7 November 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 7 November 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. Although I gave consideration to exercising 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, I am unable to do so. 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 March 2018 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 21 December 2017. Following a request to that effect, the decision dated 15 March 2018 was reconsidered on 12 April 2018 but was not changed. An appeal against the decision dated 15 March 2018 was received in the Department on 11 May 2018.

6. The appeal tribunal hearing took place on 7 November 2018. The appellant was present and was represented. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 15 March 2018.

7. On 23 May 2019 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 18 June 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 24 July 2019 a further application for leave to appeal was received in the Office of the Social Security Commissioners. The appellant was represented in the application by Mr Black of the Law Centre (Northern Ireland). On 3 September 2019 observations on the application for leave to appeal were requested from Decision Making Services (DMS). v In written observations dated 19 September 2019, Ms Patterson, for DMS, opposed the application on the grounds advanced by Mr Black. The written observations were shared with the appellant and Mr Black on 20 September 2019. On 4 October 2019 further correspondence was received from Mr Black which was shared with Ms Patterson on 7 October 2019.

9. The case became part of my workload on 5 February 2020. On 21 April 2020 I granted leave to appeal. When granting leave to appeal I gave as a reason that the ground of appeal, as set out in the application for leave to appeal was arguable. On the same date I determined that an oral hearing of the appeal would not be required.

Errors of law

10. 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?

11. 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;
>
> (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."

Analysis

12. In the application for leave to appeal, Mr Black set out the following grounds of appeal:

> 'It is submitted that the tribunal has erred in law by failing to give adequate explanation of why they have not awarded points in respect of activity 5 of the daily living descriptors.
>
> The claimant states in their evidence that they make use of incontinence pads in order to assist with a problem of incontinence, weakness and urgency. The MQM of the tribunal also noted this, along with possible referrals, from the medical notes and records available. However, when coming to their decision on awarding points under activity 5 of the descriptors the tribunal has awarded 0 points. When coming to this decision they make no reference to the use of incontinence pads by the appellant or of the referral in her medical notes regarding incontinence. If satisfied, this would entitle the claimant to 2 additional

points under descriptor 5b – *Needs to use an aid or appliance to be able to manage toilet needs or incontinence*. It is set out in 2016 UKUT 456 AAC [CPIP/2908/2015] that incontinence pads are an 'aid or appliance' for managing incontinence under activity 5.

The tribunal has therefore erred by not awarding the additional 2 points or, at the very least, by not adequately explaining their decision not to award these points in their statement of reasons. Had the tribunal made an award under 5b, this would have entitled the claimant to an additional 2 points under the daily living descriptors, leading to an award of 8 points overall for the Daily Living descriptors and so an award of the standard rate. This error should therefore be considered a material one.'

13. In her written observations on the application for leave to appeal, Ms Patterson made the following submissions in response:

'Mr Black's assertion is that descriptor 5(b) is applicable: 'Needs to use an aid or appliance to be able to manage toilet needs or incontinence', which carries an award of 2 points.

The question is whether the Tribunal made sufficient findings of fact regarding the extent of (the appellant's) issues in this activity within the meaning of Activity 5. The Personal Independence Payment Regulations (NI) 2016 hold the following definition:

> *"manage incontinence" means manage involuntary evacuation of the bowel or bladder, including use a collecting device or self-catheterisation, and clean oneself afterwards;*

In GB decision KO v SSWP (PIP) [2018] UKUT 78 (AAC) Judge Rowley provided principles in respect of Managing toilet needs as follows:

> *"5. The following principles have been established in Upper Tribunal cases:*
>
> *(a) Incontinence pads fall within the definition of "an aid or appliance" (BS v SSWP (PIP) [2016] UKUT 456 (AAC).*
>
> *(b) "Descriptor 5b can be satisfied in its terms by a reasonable need to use an aid or appliance on a precautionary basis on many*

more days than those on which incontinence actually occurs." (SSWP v NH (PIP) [2017] UKUT 258 (AAC)).

(c) The "need" must be a reasonable need. Thus, the descriptor may be satisfied even if an aid or appliance is not actually used, so long as it is reasonably needed (MB v SSWP (PIP) [2016] UKUT 250 (AAC)).

(d) It is sufficient if a person satisfies a descriptor at some point during a 24 hour period, for a period which is more than trifling and which has some degree of impact on him or her (TR v SSWP (PIP) [2015] UKUT 626 (AAC); [2016] AACR 23).
"

In her PIP2 form (the appellant) indicated that she uses pads usually but that they don't really help, that she has a weak bladder and requires to be near a toilet at all times due to urgency. At assessment, similarly (the appellant) indicated that she uses pads. The Disability Assessor's medical opinion was to acknowledge that (the appellant) does suffer from incontinence but not on the majority of days, noting that she has no specialist input.

The Record of Proceedings includes the following excerpts relating to the activity of Managing Toilet Needs:

'Toileting – getting on and off the toilet are issues. Has IBS.

'…Bladder – Kidney Infections are the worst. I have had the same since childhood. I suffer frequently due to infections. Otherwise I have constant weakness and urgency. I am worse if my back is sore. I use over-the-counter pads but have not been referred to the Continence Team (the Medically Qualified Member thought from the notes that she had been referred but did not attend).

'Irritable Bowel Syndrome (IBS) – Put down to food eating a few years ago. I have constant pains. I get constipation but no diarrhoea. Diet? I don't really have one, although I avoid food which makes the IBS worse.

'…Toileting etc – I have no seats or rails.'

In its Statement of Reasons, again I note the following relevant notes:

From (the appellant)'s GP records:

'13/8/18…normal bladder/bowel'.

'<u>Toileting</u>

We believed that her back was mostly OK and that she was able to get up and down from the toilet. We did not believe that back problems, bladder problems, getting to toilet problems, kidney infections etc. as indicated were leading to an inability to manage her toileting. There was very little in the notes and records indicating a problem and the Panel were not convinced by the evidence put forward, and decided to award no points.'

From the Tribunal's treatment of the evidence, it would seem it did not feel that (the appellant) reasonably needed an aid. The Tribunal's opinion, whilst acknowledging the issues she has raised, appears to be that (the appellant) is able to manage her toilet needs independently, therefore she does not require an aid.

Having perused the Tribunal's reasons along with the body of evidence held, on balance I do not feel there has been an error. The GP evidence does not suggest (the appellant) suffers limitation in this area, she has never had specialist input for this, and the Tribunal found the evidence put forward unconvincing, which it was entitled to do. As a note, should the Commissioner decide that the Tribunal erred in its findings of fact regarding the extent of (the appellant's) problems in this i.e. whether her problems amount to incontinence, it would be my submission that 5b could indeed apply to her. Despite the Disability Assessor's view that the incontinence does not occur on the majority of days, because the risk is there for the majority of the time, per Judge Rowley's decision referenced earlier in this submission, descriptor 5b would be applicable.'

14. I have certain reservations about the appeal tribunal's reasoning. The first relates to the notes in the record of proceedings of the appellant's

evidence with respect to continence. As was noted above, the appeal tribunal recorded:

> 'I use over-the-counter pads but have not been referred to the Continence Team (the MQM thought from the notes that she had been referred but did not attend).'

15. 'MQM' refers to 'Medically Qualified Member'. From this extract, I am assuming that the appellant gave oral evidence that (i) she used incontinence pads which she purchased herself and (ii) had not been selected for specialist referral. It is not clear, however, how the MQM's intervention concerning the possibility that the appellant's evidence about non-referral to a continence specialist came about. It may be that the matter was mentioned during the course of the appeal tribunal hearing immediately after the appellant gave her specific evidence, thereby permitting the appellant and/or her representative to comment on the apparent ambiguity. Equally though it may be that the matter was referred to during the appeal tribunal's deliberations after the oral hearing had ended when the issue of continence and the appellant's evidence about non-referral was being discussed.

16. Turning to the appeal tribunal's reasoning, it appears to have accepted that the appellant did have a problem with continence. The sentence 'We did not believe that back problems, **bladder problems, getting to toilet problems, kidney infections etc**. as indicated were leading to an inability to manage her toileting.' (emphasis is my own) suggests that the while the appeal tribunal did not accept that the conditions were leading to any inability to manage toilet needs, it did accept that the listed conditions were real for the appellant. There is no indication, however, as to what the appeal tribunal made of the evidence that she used incontinence pads to manage her problems with continence. That may be because the appeal tribunal's reasoning is redolent of a focus on the physical act of using the toilet. I accept that the appellant's representative had advanced a submission, as recorded in the record of proceedings that the appellant's problems with toileting arose from her back problems. The appellant herself gave evidence to that effect. Equally though, the appellant described problems with 'constant weakness and urgency'

17. I do not ignore that the appeal tribunal stated, in very general terms, that it was '… not convinced by the evidence put forward.' One might surmise from that the appeal tribunal simply did not accept that the appellant did make use of incontinence pads or that she did not have the incontinence problems that she described. Equally, though, it might be the case that the appeal tribunal did accept that the appellant did use incontinence pads to manage her problems but that such an aid was not reasonably required. The difficulty is that I am having to speculate about what the appeal tribunal's reasons were for not applying a different descriptor when those reasons could and should have been more explicit. The requirement for greater clarity was enhanced when, as Mr

Black has observed, the potential applicability of a different activity 5 descriptor would have made a material difference to the scoring and might have led to an award of entitlement to the standard rate of the daily living component of PIP. I cannot also overlook that the appeal tribunal stated that 'There was very little in the notes and records indicating a problem …' when, as was noted above, there was an element of ambiguity as to whether specialist referral was recommended.

18. I accept that this issue is a narrow one but given the significance of the applicability of a different activity 5 descriptor to potential benefit entitlement, I have come to the view that greater clarity of evidential assessment and reasoning was required. With a great deal of reluctance, therefore, given the appeal tribunal's careful and judicious management of the other aspects of the appeal, I find that the decision of the appeal tribunal is in error of law.

Disposal

19. The decision of the appeal tribunal dated 7 November 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.

20. 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 March 2018 in which a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 21 December 2017;

    (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 PIP 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

23 June 2020