KD-v-Department for Communities (PIP) [2020] NICom 80

Decision No: C34/20-21(PIP)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

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 8 August 2019

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 LD/11109/18/03/D.

2. For the reasons I give below, I grant leave to appeal. I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I direct that the appeal shall be determined by a newly constituted tribunal.

REASONS

Background

3. The applicant had previously been awarded disability living allowance (DLA) from 23 February 2004, most recently at the low rate of the mobility component and the middle rate of the care component from 23 February 2010. As his award of DLA was due to terminate under the Welfare Reform (NI) Order 2015, he was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). He claimed PIP from 9 July 2018 on the basis of needs arising from panic attacks, anxiety, insomnia, depression, diarrhoea, manic episodes, agoraphobia, paranoia, social phobia, mood swings, addictions, muscle spasms and dyslexia.

4. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 15 August 2018. He

asked for evidence relating to his previous DLA claim to be considered. The applicant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 13 September 2018. On 27 September 2018 the Department decided that the applicant did not satisfy the conditions of entitlement to the daily living component of PIP, but satisfied the conditions of entitlement to the enhanced mobility component from 31 October 2018 to 3 September 2022. The applicant requested a reconsideration of the decision, submitting further evidence. He was notified that the decision had been reconsidered by the Department but not revised. He appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 27 November 2019. 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 11 February 2020. On 24 February 2020 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The applicant, represented by Mr McGuinness of Advice North West, submits that the tribunal has erred in law by:

   (i) failing to make allowances for him at hearing in accordance with a practice direction issued by the Senior President of Tribunals in Great Britain;

   (ii) failing to explore the relevant disputed daily living activities;

   (iii) placing undue weight on the fact that he was employed part-time.

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 accepted that the tribunal had materially erred in law. He indicated that the Department supported the application.

8. The Department did not agree with the appellant's grounds of appeal. The basis for the Department's support was not the adequacy of the tribunal's reasons, but the consistency of its reasons, criticising the tribunal for failing to explain why some of the applicant's evidence was accepted and some not, failing to put assumed inconsistencies to the

applicant for a response and failing to ask specific questions on relevant activities.

9. The applicant responded – continuing to place reliance on the Practice Direction of the Senior President of Tribunals in Great Britain, and on the decision of Judge Poynter in the Great Britain Upper Tribunal (*RT v SSWP* [2019] UKUT 207) applying it. Mr Arthurs re-iterated his observations that the Practice Direction does not apply in Northern Ireland. Mr McGuinness in turn relied upon the general duty on the tribunal to act fairly.

10. As the parties each submit that the tribunal has erred in law, I grant leave to appeal.

The tribunal's decision

11. 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 PIP2 questionnaire completed by the applicant and a PA4 V3 consultation report from the HCP. It had material including a previous HCP report, a consultant psychiatrist's letter, a GP letter, supplementary medical advice notes and GP factual reports. It had sight of the applicant's GP records for the previous two years and a submission from Mr McGuinness. The applicant attended the hearing and gave oral evidence, The Department was represented by Mr McEvoy.

12. The tribunal asked the applicant about his treatment, his work and his ability to drive. It found that he had a confirmed medical history of generalised anxiety disorder with panic, social anxiety and agoraphobia, insomnia and shoulder joint pain, which was injected with steroids in October 2017. It found that he was treated with Quetiapine and Diazepam. It accepted that he had symptoms from his medical condition, being difficulty socialising. It found, despite the applicant's agitated state at hearing, his evidence unpersuasive. It found an inconsistency between claimed dyslexia and working with files in the family business. It found that he was unable to identify any personal care that he got. It gave less weight to his oral evidence than the clinical evidence. It made findings on the daily living activities that were evidently drawn from the tribunal's view of the applicant's general lifestyle than direct questioning on the issues. On the basis of the findings it maintained the award of mobility component and disallowed the daily living component.

Relevant legislation

13. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component. These components may be payable to claimants whose ability to carry out daily activities or mobility activities is limited, or severely limited, by their

physical or mental condition. The Personal Independence Payment Regulations (NI) 2016 (the 2016 Regulations) set out the detailed requirements for satisfying the above conditions.

14. The 2016 Regulations provide for points to be awarded when a descriptor set out in Schedule 1, Part 2 (daily living activities table) or Schedule 1, Part 3 (mobility activities table) is satisfied. Subject to other conditions of entitlement, in each of the components a claimant who obtains a score of 8 points will be awarded the standard rate of that component, while a clamant who obtains a score of 12 points will be awarded the enhanced rate of that component.

Assessment

15. Mr McGuinness' reliance on the Practice Direction of the Senior President of Tribunals in Great Britain is plainly misconceived. The Commissioner has jurisdiction to apply the law of Northern Ireland and cannot apply law that applies only to a different jurisdiction. The Senior President of Tribunals is a position that was created in Great Britain by the Leggatt tribunal reforms of 2008, under the Tribunals Courts and Enforcement Act 2007. Significant tribunal reform in Northern Ireland was not undertaken. It order to fill the gap, necessary principles may well be evolved in Northern Ireland, such as by the Tribunal of Commissions in *SA v Department for Communities* [2020] NI Com 38. On the basis of *SA*, a case may well be argued on similar grounds to those advanced by Mr McGuinness. However, as the parties are in agreement on other matters, I will not address that issue further.

16. The parties are in agreement that the tribunal has erred in law, but for different reasons. Mr McGuinness places most weight on the difficulties on the appellant giving evidence to the tribunal, but relies on a Great Britain practice direction which is not in effect in Northern Ireland. Mr Arthurs finds the tribunal's approach to clarifying inconsistencies in the evidence more problematic. He said in his submissions:

> "All reasons for activities 2, 5, 6, 7, 8, and 9 are equally brief but I consider each to be a summary of the tribunal's opinion with its actual reasons for every decision on each activity contained within the following excerpt:
>
> > *"The Claimant's evidence today, despite his agitated state, is not persuasive. His answers were evasive, asserting several times that he did not understand the questions being put to him. Written evidence asserted dyslexia. The tribunal does not understand this as he advised his work in the family business was with files. He was unable to tell us in any specific*

> *manner what care he got or need in relation to his personal needs, apart from saying that he got help with "everything" and a mention of cooking and laundering. Accordingly the Tribunal prefers to place more reliance on the clinical evidence and management than on the written and oral evidence of the claimant."*

If the tribunal's reasons were consistent and easy to understand I see no problem with the brevity of recording them in such a way. However I find that in general the tribunal's reasons are inconsistent and lack detail to explain the inconsistencies i.e. when the tribunal felt the testimony of the appellant was suitable for inclusion and when it wasn't or what the medical evidence was that supported the decisions and provided a counter position to the appellant's claims. The appellant, to the best of my knowledge, was not asked about the conflicting information either and therefore was not given an opportunity to explain why his medical data does not support his claims. The tribunal has noted that the appellant was evasive and unpersuasive however this could have been in response to general questions. The tribunal could have, instead, identified contradictory statements within the appellant's medical evidence and put these as questions to the appellant. The tribunal could have focused on specific issues as opposed to asking him broader questions about his conditions and functional restrictions".

17. I tend to agree with Mr Arthurs. It appears to me that the tribunal's record of proceedings does not appear to adduce direct evidence from the applicant on the daily living activities themselves, but rather to take an approach of inferring his abilities to perform daily activities on the basis of his general lifestyle.

18. In the case of *UB-v-Department for Communities* [2020] NI Com 55 I had said:

> 50. When a decision taken by the Department is appealed, the appeal tribunal stands in the shoes of the Department. The principles set out by Lord Hope in *Kerr v. Department for Social Development* equally apply in the context of an appeal. Thus, facts which may reasonably be supposed to within the appellant's own knowledge are for the appellant to supply at each stage of the appeal. However, the appellant must be given a reasonable opportunity to supply them.

> 51. Specific issues, such as dressing and washing had been put in issue by the appellant. Nevertheless, the tribunal clearly struggled to adduce relevant responses from the appointee to its open questions about daily care needs. The process of asking open questions might well be required in examination in chief in adversarial court proceedings. However, in tribunal proceedings, which turn on very detailed specific descriptors and activities, it is clear that open questions are rarely appropriate. People who come before tribunals may often lack the knowledge to understand what information the tribunal needs, may be inhibited by the unfamiliar surroundings from speaking out or, frankly, may lack the intelligence or insight to explain their circumstances clearly. The tribunal in a PIP appeal is obliged to help such people by asking specific questions aimed at establishing evidence relevant to the activities and descriptors in issue. Any other approach does not give the appellant a reasonable opportunity to supply relevant answers.

19. I consider that these passages are relevant to the present case also.

20. On the submissions of the parties, I am satisfied that the tribunal has erred in law. I allow the appeal. I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.

(signed): O Stockman

Commissioner

11 November 2020