BH-v-Department for Communities (DLA) [2020] NICom 9

Decision No: C8/19-20(DLA)

IRO: A CHILD

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 16 May 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 Belfast.

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

REASONS

Background

3. The applicant is a child and is represented by her father, who acts as her appointee. Through her appointee she claimed and was awarded disability living allowance (DLA) from 18 November 2010 to 17 November 2017 at the middle rate of the care component. She made a renewal claim to the Department for Communities (the Department) from 18 November 2017 on the basis of needs arising from asthma, eczema and anxiety. The Department obtained a report from the applicant's general practitioner (GP) on 7 December 2017. On 14 December 2017 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 18 November 2017. The applicant sought reconsideration of that decision and, when it was reconsidered but not revised, she appealed.

4. 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 16 May 2018 the tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 24 January 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 30 April 2019. On 15 May 2019 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The applicant, represented by Mr Rankin of Breen, Rankin, Lenzi Solicitors, submits that the tribunal has erred in law on the basis that:

   (i) it placed undue reliance on a school report;

   (ii) it placed insufficient weight on the applicant's GP's report;

   (iii) it misdirected itself as to what amount of attention amounted to attention for a significant portion of the day;

   (iv) it misdirected itself in law as to whether the applicant received continual supervision from her father.

6. The Department was invited to make observations on the applicant's grounds. Mr Kirk of Decision Making Services (DMS) responded on behalf of the Department. Mr Kirk submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.

The tribunal's decision

7. 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 applicant's claim form, a factual report from the applicant's GP and a school report. Further information had been provided by way of a letter from the school principal to augment the report and a letter from a counselling service. The tribunal further had sight of the applicant's medical records, brought on the day of hearing.

8. The tribunal accepted that the applicant's main conditions were asthma, eczema and anxiety. It found that she could get up in the morning, get dressed and take her inhalers by herself, bath and feed herself. It accepted that she required attention to apply cream to her skin in relation to her eczema every morning and night for 15-20 minutes each time. However, it found that she can largely perform most activities of personal care, and managed inhalers except during an occasional particularly bad episode.

9. The tribunal found that the applicant's mobility was not affected by her conditions. It further found that the applicant did not satisfy the test of entitlement for the care component at any rate.

Relevant legislation

10. 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.

11. 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.

…

Assessment

12. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.

13. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

14. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.

15. The applicant relies on four grounds. It appears to me that three of those are without merit.

16. Firstly, it is submitted that the tribunal has made an error of law by placing reliance on a school report that was accepted as containing inaccuracies. It is correct to state that the school principal's report of 25 January 2018 on Departmental pro forma DBD 376N, which contained a ticked box stating that the applicant did not take medication at school, was corrected by a letter from the principal dated 20 February 2018 that stated that the applicant took an asthma inhaler after exercise, including PE, swimming and outdoor games. However, that does not mean, as submitted by the applicant, that this fatally undermines any other assertions in the report. It was perfectly open to the tribunal to accept the remainder of the report in the context of this correction.

17. It is further asserted that the principal "stipulated misgivings about the nature of the questions which were being posed" in the report. This appears to be a reference to the principal's insertion of question marks to the section asking whether the child could take medication herself and whether she was reliable in doing so. In the context of the principal's initial statement that the applicant did not take any medication at school, I regard these as more obviously a statement to the effect that the principal had no knowledge of the child's ability to take medication in her life outside school.

18. The third sub-point on this ground appears to repeat the first, essentially placing doubt on the accuracy of any information in the first report on the basis that it contained some erroneous information. I consider that it was open to the tribunal to accept some evidence from the school report while rejecting other evidence in the same report. There was nothing to indicate that the corrected evidence regarding medication should taint the remaining evidence in the report to the extent that it was unreasonable of the tribunal to place reliance on it.

19. The applicant secondly submits that the tribunal placed insufficient weight on the applicant's GP's report. This stated that the applicant required help with all daily activities. The tribunal was addressing the needs of a 10 year old child who, as a result of her young age, would clearly have a need for attention with some daily living activities. However, it appears to me that the tribunal would have been entitled to query whether the conditions of asthma, eczema and anxiety would have affected all daily living activities.

20. The applicant submits that the GP's evidence was not contradicted by other evidence and that the tribunal gave no reasons for non-acceptance of this medical evidence. However, the tribunal heard direct evidence from the applicant's father of the nature of her needs. This contradicted the GP's account that she needed help with all activities of daily living. It is clearly stated by the tribunal that it preferred the applicant's father's evidence to the report of the GP (see statement of reasons paragraph 20). I do not consider that this ground is arguable.

21. The applicant submits in her fourth ground that the tribunal misdirected itself in law as to whether the applicant received continual supervision from her father. Reliance is placed on some case law from 1988 (*Moran*) and 1994 (CDLA/420/94). These cases are addressed to the degree of monitoring that might constitute supervision. The tribunal noted the school report to the effect that the applicant had no age inappropriate supervisory needs. In the context of asthma, it noted that the applicant had no need for recent hospitalisation, steroid or nebulizer treatment, which indicated a reduced risk and reduced need for supervision to avoid substantial danger to her. I do not consider that it is arguable that the tribunal has misdirected itself in law in addressing the question of whether the applicant required continual supervision to avoid substantial danger to herself.

22. The third ground advanced is whether the tribunal has erred in law in finding that the attention amounting to 40 minutes each day did not constitute attention for a significant portion of the day. I directed further submissions on this ground. I grant leave to appeal on this ground.

23. For the Department, Mr Kirk referred to Departmental guidance in the Decision Maker's Guide paragraph 61206. This stated that:

    61206 The word "significant" should be given its ordinary meaning of not negligible or trivial. What may amount to a "significant portion of the day" depends largely on a person's individual circumstances. An hour may be considered reasonable in many cases. Attention required for a period of less than an hour may be sufficient if

    1. attention is provided on a considerable number of small occasions and produces other disruptions to the carer's affairs **or**

    2. the attention required is very intense (such as cleaning up after faecal incontinence or administering complex therapies)[1].

    1 Ramsden v Secretary of State for Work and Pensions; R(DLA) 2/03

24. Mr Kirk then referred to a number of authorities which engage with the meaning of "significant portion of the day". The most relevant of these, it

appears to me, are the decision of Mrs Commissioner Brown in C35/98(DLA) and that of Chief Commissioner Mullan in C95/10-11(DLA). In C35/98(DLA) at paragraph 8, Mrs Commissioner Brown stated:

> "8. With regard to the second ground of appeal i.e. that attention for a lesser period of time than one hour could be significant depending on the circumstances, I do not consider that the Tribunal erred in this respect. It appears to me quite a reasonable conclusion to reach that attention which in the aggregate does not exceed one hour is not attention for a significant period of time. I have considered CSDLA/29/94. There is no legislative prescription that the attention must exceed an hour to be significant. However the word "significant" when set in the context of the phrase "attention for a significant portion of the day" relates to time. I agree with CSDLA/29/94 in that respect. However I consider the proposition "for" relates to the duration of the attention given rather than to the degree of disruption to the affairs of the attender. Otherwise the same amount of attention to the same claimant could qualify or not qualify depending on who is chosen as attender. That cannot have been intended and the words do not bear that construction. "For" appears to me to mean during and to relate to the portion of the day for which attention is required. I do not share the reasoning of CSDLA/29/94 with relation to the position of the attender. The Tribunal, in this case, having found that the attention did not exceed one hour in total was perfectly entitled to reach the conclusion that this was not attention for a significant portion of the day. I can find no error in the Tribunal's decision in this respect."

25. Chief Commissioner Mullan said in C95/10-11(DLA) at paragraph 33:

> "33. I would add the following very general comments, however, which, of course, must be read in context. To the extent that there is a conflict in the reasoning of the Commissioner in Great Britain in CSDLA/29/94 and the reasoning of Mrs Commissioner Brown in C35/98 (DLA), I prefer the reasoning of Mrs Commissioner Brown. I accept that the decision of the Commissioner in CSDLA/29/94 was approved of by Lord Justice Potter at paragraph 40 of the decision in Ramsden and that Mrs Commissioner Brown did not have the benefit of the reasoning in Ramsden. It seems

> to me, however, that the context in which that approval was given was in the proper approach to the meaning of the phrase 'significant portion of the day' rather than whether the assessment of satisfaction of the test should be from the perspective of an attender. I am also not sure whether the Commissioner in CSDLA/29/94 meant that the factor of the disruptive effect of the provision attention on the affairs of the attender was to have such a wide application to be the sole determinate of the test."

26. Mr Kirk submitted that there is no definite boundary that qualifies what could or could not constitute attention for a significant portion of the day.

27. In response to Mr Kirk, Mr Rankin, the applicant's representative, accepted that the position adopted by the Department represented a fair and comprehensive overview of the relevant jurisprudence dealing with the issue of "a significant portion of the day". However, he referred to the judgement of Potter LJ in *Ramsden v Secretary of State for Work and Pensions* [2003] EWCA Civ 32, citing paragraph 39 and submitting that the intensity of attention provided from the perspective of the attender was a relevant factor in the determination that the tribunal had not correctly addressed.

28. In paragraph 39, Potter LJ had said:

> "… In those circumstances the assessment of the Tribunal as to whether or not the time spent in attention to the bodily functions of the applicant constitutes a significant portion of the day, depends principally upon the mathematical exercise to which I have referred. However, it is also likely to be affected by the total time available in the day, by the extent to which the relevant tasks become a matter of routine, and the concentration and intensity of the activity comprised in those tasks. Thus, while in broad terms it seems to me that a period of one hour, made up of two half-hour periods of concentrated activity, would reasonably be regarded as a significant portion of a day, in different circumstances there may well be room for a different view".

29. Potter LJ then considered, at paragraph 40, the case of CSDLA/29/94, a decision of Great Britain Commissioner Walker, which applied the significant portion of the day test from the perspective of the attender. Applying the test from the perspective of the attender has been expressly disapproved by Chief Commissioner Mullan, and CSDLA/29/94 was disapproved by Mrs Commissioner Brown.

30. It appears to me that the remarks of Potter LJ were made in the context of particularly intense attention, resulting from regular faecal soiling. The present case concerns the application of creams to counteract eczema. Whereas Mr Rankin seeks to aggregate other forms of attention that the tribunal had not accepted as required on a daily basis, I cannot include them in consideration and must confine my analysis to the attention needs accepted by the tribunal.

31. It seems to me that the perspective of the attender cannot be relevant to the overall assessment. The qualitative nature of the attention given may well vary, but the legislative test is addressed very simply to the time taken to perform the attention that is required. The tribunal in the particular case found that attention was given twice a day amounting to 15-20 minutes each time. This aggregates as 30—40 minutes each day. A different tribunal may well have accepted that 40 minutes amounted to a significant portion of the day. However, the present tribunal did not. The question for me is whether a finding that a maximum of 40 minutes per day did not amount to a significant portion of the day was a finding that was legally open to the tribunal. The tribunal did not apply any inappropriate "rule of thumb" figure when addressing the question and thereby fetter its own discretion.

32. In all the circumstances of the case, I cannot hold that the tribunal has made a decision outside the reasonable boundaries open to it by finding that attention for 30-40 minutes each day did not amount to attention for a significant portion of the day. A different tribunal might lawfully have reached a different conclusion on the same facts, but I do not accept that the tribunal has erred in law.

33. It follows that I must disallow the appeal.

(signed): O Stockman

Commissioner

4 February 2020