FQ-v-Department for Communities (PIP) [2021] NICom 13

Decision No: C37/20-21(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 30 October 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 EK/3280/19/03/D.

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

REASONS

Background

3. The appellant had previously been awarded disability living allowance (DLA) from 21 March 2010, most recently at the high rate of the mobility component and the middle rate of the care component. As her award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, she was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). She duly claimed PIP from 1 October 2018 on the basis of needs arising from prolapsed discs, transient ischaemic attacks, arthritis, degenerative disc disease, depression and anxiety.

4. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 24 October 2018. She asked for evidence relating to her previous DLA claim to be considered. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of

the consultation on 21 November 2018. The Department received a supplementary advice note on 9 January 2019. On 10 January 2019 the Department decided that the appellant satisfied the conditions of entitlement to the standard rate of the daily living component but did not satisfy the conditions of entitlement to the mobility component of PIP from and including 1 October 2018. The appellant requested a reconsideration of the decision, submitting further evidence from her general practitioner (GP), and an occupational therapist's letter. She was notified that the decision had been reconsidered by the Department but not revised. She 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, maintaining the award of daily living component from 13 February 2019 to 11 November 2022 and disallowing mobility component. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 10 June 2020. The appellant 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 5 August 2020. On 20 August 2020 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant submits that the tribunal has erred in law by failing to fully consider her mobility restrictions - with regard to repeatedly, reliably walking in a timely manner - due to pain and unsteadiness.

7. The Department was invited to make observations on the appellant's grounds. Mr Arthurs of Decision Making Services (DMS) responded on behalf of the Department. Mr Arthurs accepted that the tribunal had erred in law. He indicated that the Department supported the application for leave to appeal.

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 consisting of the Department's submission, containing the PIP2 questionnaire completed by the appellant and a consultation report from the HCP, previous DLA evidence, a supplementary advice note from a HCP, and letters from the appellant's general practitioner (GP) and occupational therapist (OT). It had sight of the record of proceedings from a previous adjourned hearing and the appellant's medical records. The appellant attended the hearing and gave oral evidence, represented by her niece.

9. The tribunal accepted that the appellant was functionally restricted by a number of conditions – including prolapsed discs, degenerative disc

disease, arthritis and depression/anxiety. The Department had previously awarded 8 points for daily living activities and 4 for mobility activities. The tribunal characterised the issue in the appeal as the extent to which the appellant was restricted by the accepted conditions. It accepted the 8 daily living points assessed by the Department (activity 1.b – preparing food, activity 4.b – washing/bathing, activity 5.b – managing toilet needs and activity 6.b – dressing/undressing) and accepted 1 further point each for activity 3.b(i) – managing treatment and for the higher scoring descriptor at activity 4.e, totalling 10 points for daily living. In relation to mobility activities the tribunal found no functional restriction with activity 1, and accepted that 4 points should be awarded for activity 2.b – on the basis that the appellant was restricted in her ability to walk between 50 and 200 metres on a repeated basis. The tribunal therefore awarded standard rate of daily living component, and disallowed the mobility component.

Relevant legislation

10. 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.

11. 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.

12. Additionally, by regulation 4, certain other parameters for the assessment of daily living and mobility activities, as follows:

> **4.**—(1) For the purposes of Article 82(2) and Article 83 or, as the case may be, 84 whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment taking account of relevant medical evidence.
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> (2) C's ability to carry out an activity is to be assessed—
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> > (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or

(b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.

(3) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—

(a) safely;

(b) to an acceptable standard;

(c) repeatedly; and

(d) within a reasonable time period.

(4) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(5) In this regulation—

"reasonable time period" means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity;

"repeatedly" means as often as the activity being assessed is reasonably required to be completed; and

"safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity.

13. The particular activity in dispute in the present appeal is mobility activity 2. This provides:

2. Moving around.

a. Can stand and then move more than 200 metres, either aided or unaided.	0
b. Can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided.	4

c. Can stand and then move unaided more than 20 metres but no more than 50 metres.	8
d. Can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres.	10
e. Can stand and then move more than 1 metre but no more than 20 metres, either aided or unaided.	12
f. Cannot, either aided or unaided, –	12
(i) stand, or	
(ii) move more than 1 metre.	

Submissions

14. The appellant submitted that the tribunal, when assessing her mobility, had failed to have adequate regard to whether she could mobilise repeatedly, reliably or in a timely manner due to pain and unsteadiness. In other words, the tribunal did not apply regulation 4(3) above correctly.

15. Mr Arthurs for the Department noted that the appellant relied on regulation 4(3). He accepted that, overall, the tribunal had failed to give the impression that it considered regulation 4(3) in relation to daily living activities. However, he accepted that the particular manner in which the tribunal applied the provisions of regulation 4(3) to this mobility activity 2 had led to a material error of law. He noted that the tribunal's reasons were as follows:

> *"**Moving Around.** We accepted that she had some back difficulties though there was little mention of the back for some time. It was the same with her knee problems which had been mentioned in 2016 but very little since. The best that the Panel felt that they could award was 4 points for the distance of between 50 and 200 metres and this was only on the basis of repetition of that. **We felt that she could manage the 200 metres ok but potentially would have difficulties repeating same.** We noted that she had no aids, though she did like to use a trolley in the supermarket, 4 points was the absolute maximum that we could award on the evidence."* [Mr Arthurs' emphasis]

16. Mr Arthurs submitted that it was inconsistent with the legislation that if the descriptor within this activity cannot be completed repeatedly then it cannot be completed at all. He queried whether the appellant would have been suitable for an award of a higher scoring descriptor which could have led to an award of the mobility component.

17. He acknowledged that this may be a case of poor wording by the tribunal in its reasons. However he submitted that it might equally amount to an error of law if the wording makes the decision incomprehensible to the layman. He submitted that the tribunal may have been trying to apply some measure of proportion by, for example, drawing attention to the trolley and therefore recognizing that an aid may be beneficial in completing this activity. However overall he submitted that there was insufficient clarity in the tribunal's reasons as to how it applied regulation 4(3) and therefore he submitted that the tribunal was in error of law.

    On the basis of the Department's support, I granted leave to appeal. However, I indicated that I was not minded to exercise my discretion under Article 15(7) of the Social Security (NI) Order 1998 to set aside the tribunal's decision. I gave the appellant an opportunity to make further submissions and to provide evidence and directed her to do this within 28 days. She did not respond.

Assessment

18. 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.

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

20. 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.

21. As the Department offers support for the application, I grant leave to appeal, as such support indicates that an arguable case has been established. The gist of the concession by the Department is that the explanation of the tribunal's decision in its statement of reasons is unclear.

22. The activity in question in this appeal is mobility activity 2. From the scoresheet and from its statement of reasons it is clear that the tribunal accepted that the appellant satisfied descriptor 2.b – meaning that it

accepted that she could stand and then move more than 50 metres but no more than 200 metres, either aided or unaided.

23. Where the confusion described by Mr Arthurs may arise is in the tribunal's statement that it would "*award … 4 points for the distance of between 50 and 200 metres … on the basis of repetition of that".* He appears to suggest that, if the appellant could not repeat a walking distance of between 50 and 200 metres, she might therefore attract a higher level of scoring.

24. However, I am not convinced that this is what the tribunal was saying. Mr Arthurs refers to the sentence "*We felt that she could manage the 200 metres ok but potentially would have difficulties repeating same".* To me, this is saying that the tribunal felt that the appellant could manage to walk 200 metres without any limitation, but that she would not be able to repeat this. This would exclude her from falling under 2.a, which would result in no points, and bring her into 2.b, which is consistent with the tribunal's findings and conclusion of an award of 4 points. There is nothing in these reasons to suggest that the tribunal found that the appellant could not repeatedly walk more than 50 metres, such as to place her into 2.c, the next scoring descriptor.

25. Mr Arthurs submits that the tribunal's reasons should be clear and that there is a lack of sufficient clarity in this case. I acknowledge that there is some force in this. Furthermore, the language of the tribunal slips at times almost into apology for its decision not reaching the scoring threshold, e.g. "the best the Panel felt they could award was …" and "4 points was the absolute maximum that we could award on the evidence". Nevertheless, I do not consider that any confusion reasonably arises when the decision is considered overall. I do not accept the Department's submission that the tribunal has erred in law for giving inadequate reasons.

26. Turning to the applicant's own grounds, she submitted that the tribunal had not addressed the restrictions she has when walking due to severe pain and unsteadiness. Converting this into the language of the legislation, I have characterised this as a submission that the tribunal has not addressed regulation 4(3) adequately. Regulation 4(3) requires a tribunal to have regard to whether an activity can be completed safely; to an acceptable standard; repeatedly; and within a reasonable time period. The experience of pain and the issue of unsteadiness are each relevant to the question of whether the activity of standing and moving can be completed to an acceptable standard and safely.

27. At hearing, the appellant indicated that she could walk for 15/20 minutes, slowly and then have to stop with pains. She also said that she might stop during the 15/20 minutes. Her niece took issue with the appellant's evidence, saying that she "stops and starts" when out with her on a Saturday, and that she uses a trolley for support. I observe that walking

for 15/20 minutes at a normal walking pace would equate to almost a mile. Even at half of normal walking pace, this would not be remotely consistent with the appellant's statement in the PIP2 and to the HCP that she was restricted to walking between 20-50 metres. However, the appellant did not indicate that she walked particularly slowly.

28. The tribunal noted that medical records referred to knee issues along with spinal pain. An x-ray of the right knee had shown osteoarthritis, but the appellant had indicated that she was better when up and moving around. She had been discharged with a home exercise programme of physiotherapy. Her PIP2 questionnaire indicated that she did not use mobility aids. The report of the Access to Work occupational therapy assessment provided some aids that enabled the appellant to continue her 3-day per week work as a receptionist, including anti-fatigue matting to reduce discomfort in lower joints when standing to complete tasks.

29. It does not appear to me that any issue of unsteadiness was raised by the appellant before the tribunal. It is also not implied in the absence of the use of walking aids. I cannot fault the tribunal for failing to address it in these circumstances.

30. The issue of knee pain was raised and it is evident that the tribunal took account of it. The applicant had stated in her PIP2 questionnaire and to the HCP that her walking was limited to 20-50 metres due to pain. However, the tribunal had direct evidence from the appellant of her walking ability and had evidence of medical management - including the lack of walking aids - that was clearly at odds with such a restriction. Again, I consider that the tribunal cannot be faulted for its approach. It was entitled to reach the decision that it did on the evidence before it, and no evidence completed a different conclusion that might be more favourable to the appellant.

31. I do not consider that the tribunal has erred in law and I disallow the appeal.

(signed): O Stockman

Commissioner

4 March 2021