LO'H-v-Department for Communities (PIP) [2021] NICom 60

Decision No: C5/20-21(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 28 January 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 28 January 2019 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. For further reasons set out below, 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 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. 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.

3. 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

4. On 9 May 2018 a decision maker of the Department decided that the applicant was not entitled to either component of PIP from and including 1 March 2018. Following a request to that effect and the receipt of additional evidence the decision dated 9 May 2018 was reconsidered on 20 June 2018 and was revised. The second decision maker applied descriptors from Part 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations') which the first decision maker had not applied. The score for these descriptors was insufficient for an award of entitlement to the daily living component of PIP at the standard rate – see article 83 of the Welfare Reform (Northern Ireland) Order 2015 and regulation 5 of the 2016 Regulations. The second decision maker maintained the score of zero for the mobility component of PIP.

5. An appeal against the decision dated 9 May 2018, as revised on 20 June 2018, was received in the Appeals Service (TAS) on 18 July 2018.

6. Following earlier postponements, the substantive appeal tribunal hearing took place on 28 January 2019. The applicant was not present. There was a Departmental decision maker present. The appeal tribunal disallowed the appeal and confirmed the decision dated 9 May 2018 as revised on 20 June 2018.

7. On 27 February 2019 an application to have the decision of the appeal tribunal set aside was received in TAS. On 9 April 2019 the set-aside application was refused by the Legally Qualified Panel Member (LQPM). On 21 June 2019 an application for leave to appeal to the Social Security Commissioner was received in TAS. On 1 July 2019 the application was refused by the LQPM.

Proceedings before the Social Security Commissioner

8. On 31 July 2019 a further application for leave to appeal was received in the office of the Social Security Commissioners. On 3 September 2019 observations on the application for leave to appeal were requested from Decision Making Services ('DMS'). In written observations dated 30 September 2019, Mr Arthurs, for DMS, opposed the application for leave to appeal on the grounds advanced on behalf of the applicant. Written observations were shared with the applicant and his representative on 30 September 2019. Further correspondence was received from the applicant's representative on 28 October 2019 which was shared with Mr Arthurs on 13 November 2019.

9. On 31 March 2020 I granted leave to appeal. When granting leave to appeal I gave, as a reason, that granted as it was arguable that the appeal tribunal has committed or permitted a procedural or other irregularity

capable of making a material difference to the outcome or the fairness of proceedings. 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."

The submissions of the parties

12. In the application for leave to appeal, the applicant's representative Mr Rafferty, of Rafferty and Donaghy Solicitors advanced the following grounds of appeal:

    'My client wishes to apply for leave to appeal to the Social Security Commissioner for the following reasons:

    1 It was unreasonable to proceed in the absence of the Appellant in the particular circumstances. The Tribunal misinformed itself that the Appellant was able to attend the

Hearing because it believed he had attended a Medical Examination on 13th April 2018. In fact this examination took place in the Appellant's home.

2 The Tribunal concluded that he was working in an engineering capacity. In fact he is the sole shareholder of an engineering business but there is no direct evidence that he does any physical work in that capacity which would contradict his assertions in relations to his medical conditions. His GP would support his contention that his ability to carry out Daily Living activities is severely limited by his condition.

3 There was clearly a breakdown between the Appellant and his then solicitor RM in relation to the conduct of the appeal. The Appellant would say that he was medically unable to attend and gave no instructions for the Appeal to proceed in his absence. Mr Maguire is no longer employed by this firm. The conclusion therefore by the Tribunal that the Appellant was "trying to manipulate the process and system to his advantage" was flawed and highly prejudicial and not supported by evidence.

4 Insufficient weight was given to medical evidence supportive of the Appellant's claim. Entries were interpreted as showing that the Appellant was working in the absence of any clear evidence to support this. The Tribunal has misapplied the relevant law and regulations.

5 In all the circumstances the Tribunal has erred in law and fact and the Appellant is entitled to a hearing before the Social Security Commissioner.'

13. In his written observations in response, Mr Arthurs made the following submissions:

> '***1st Ground – The Tribunal's grounds for proceeding with the hearing in (the appellant)'s absence were flawed and led to an adverse decision.***
>
> Mr Rafferty, on behalf of (the appellant), submits that the Tribunal decided to proceed with the hearing on 28 January 2019 because it has misled itself into believing that (the appellant) had attended his medical assessment on 13 April 2018 when this had occurred in his home, and that this showed an ability to mobilise that did not support his claimed functional restrictions.
>
> I cannot disagree that the Legally Qualified Member of the Tribunal has incorrectly recorded that (the appellant) attended his medical assessment on 13 April 2018. However this error does not seem to have been recorded on any documentation prior to 9 April 2018 when, on this date, the Legally Qualified Member of the panel was

required to respond to Mr Rafferty's application (dated 26 February 2019) to set aside the Tribunal's decision. In his response to this application the LQM made the following statement:

> *"The application is refused.*
>
> *It is not 'just' to set aside the decision of the 28.1.2019*
>
> *He did attend a medical examination on behalf of the Department on the 13/4/18.*
>
> *The Appellant was fully aware of the hearing on the 28/1/2019 as was his legal representative, as confirmed by telephone calls to them on the date of hearing, from the Appeals Service."*

For confirmation that the assessment took place at the appellant's home one need only look at page 1 of the PA4 V3 medical assessment report completed on 13 April 2018. That said, I do not believe this obvious error is sufficient to vitiate the tribunal's decision as I do not believe any element of the decision to proceed with the hearing was based on this misunderstanding.

When reviewing the Tribunal's reasons the following excerpts are noteworthy:

> *"…The Hearing was subsequently listed again on 28/1/19, no acknowledgement of the Hearing or confirmation of attendance was forwarded to the Appeals Service by the Appellant and his Solicitors. The Hearing was listed at 1.45pm, and the Panel waited until approximately 2.15 pm before proceeding. Neither the Appellant nor his Solicitor attended. Following discussions with the Panel, the Clerk of the Tribunal contacted both the Appellant and his Solicitor by telephone. The appellant indicated that the Solicitor was to request a postponement as something had come up. The Solicitor had said to the Appellant that the Solicitor was not available on that date. He said the Solicitor had rang him to say that he would be in touch with The Appeals Service about a postponement. The Clerk then rang the*

Solicitor's office, and the Solicitor was not available, but left a message for him to ring back. As no phone call was returned, the Clerk then rang back the Solicitor and spoke to Mr Maguire by telephone. The Solicitor indicated that he knew the Hearing was on. He had received a letter notifying them of the Hearing, and it was allocated to the solicitor dealing with the case. It may have been overlooked. He said that they had not requested a postponement, and had not advised the Appellant that he had requested a postponement on behalf of the Appellant. He had no instructions from the Appellant to apply for a postponement. He said that he would leave it in the hands of the Tribunal to proceed if need be. He did not request an adjournment.

Having considered the matter in detail, the Tribunal decided to proceed. The Hearing had previously been postponed on 15/10/18. Postponements or adjournments are only granted in exceptional circumstances. The Tribunal was dealing with a period from 1/3/18, the longer the delay in a case, the more difficult it is to obtain cogent and relevant evidence. The Tribunal was of the view that the Appellant did not want to attend the Hearing given the numerous requests in his GP Records for home visits for the purposes of claiming benefits…."

The above excerpts from the Reasons for Decision show the various reasons as to why the Tribunal proceeded with the hearing and I would submit the misapprehension that (the appellant) attended his medical assessment anywhere but his home does not feature amongst these reasons.

The Tribunal may have subsequently misled itself to believe that (the appellant) was not assessed at home however I contend that this confusion was not material to its decision making process and is not sufficient to vitiate the decision of 28 January 2019.

2nd Ground - The Tribunal mistakenly concluded that (the appellant) was working and this led to an adverse decision.

Mr Rafferty, on behalf of (the appellant), submits that the Tribunal has mistakenly decided that (the appellant) was working as a self-employed engineer in the years after his involvement in a road traffic accident in 2000 and has used this misconception to attack (the appellant's)'s credibility. Mr Rafferty contends that (the appellant) is merely the sole shareholder of an engineering business but does not undertake any physical work. (the appellant), as recorded in the Tribunal's reasons, last worked *"…as a manual labourer on building sites approximately 20 years ago, following a road traffic accident he was involved in."*

In its reasons the Tribunal makes numerous references to being employed in (the appellant's) medical records such as:

> ***Daily Living Reasons for Decision***
>
> *"…On 31/7/09, it was recorded that his daily job involved working with heavy steel objects, and a lot of lifting and bending. On 5/8/09 it was certified that he would be fit for return to work. On 29/10/09 it is certified at ICATs in Derry that he was self-employed as an Engineer.*"
>
> ***Mobility Reasons for Decision***
>
> *"…The Tribunal noted that 9 days following the road traffic accident, he had attended the A&E Department of Tyrone county Hospital when he sustained a foreign body to his left eye, which was obviously occasioned when working with heavy steel objects. …On 22/2/10, an Insurance Claim Form was submitted specifying his occupation was an Engineer. …The Tribunal noted the MRI of the lumbar spine on 19/2/10, which described the appellant as a self-employed Engineer, it described mild facet joint degenerative changes but no large disc protrusion identified."*

Throughout the reasons for both components there are numerous references to (the appellant's) lack of credibility and there is a direct connection between this and the findings in relation to his employment, for example:

> ***Daily Living Reasons***

"…He has consistently told medical assessors subsequently that he has not worked since the road traffic accident on 17/04/00. This is clearly not correct, as there are numerous entries in his GP Records with reference to him working in an Engineering capacity…It was very strange that if he was self-employed as an Engineer, he was unable to make any budgeting decisions himself. The Tribunal simply could not understand this. The Tribunal simply did not believe the 'picture' that the Appellant was painting in respect of this particular claim. The evidence in relation to the Appellant not working for some 20 years has clearly been disproved when one views the detailed GP Records."

Mobility Reasons

"…Having considered the totality of the medical evidence, and in particular the GP Records, the Tribunal had serious concerns about the genuineness and validity of the Appellant's previous claims for Benefits, given the medical evidence in the GP Records, and the Department may well wish to pursue this in due course. However his GP records is littered with reference to working as a self – employed Engineer, working with heavy steel objects. …. In his GP records, it is recorded on 29/10/09 that he was self-employed as an Engineer, on 31/07/09 it is recorded that his daily job involved working with heavy steel objects. …He uses crutches to mobilise and had not worked in the last 20 years. He was unable to drive. These statements of fact to the Assessor were clearly untrue. …He has been continually working according to the GP Records in an Engineering capacity for many years, yet despite this and despite there being numerous references to this in the GP Records, he has continually told medical assessors on behalf of the Department that he has not so worked. The Tribunal was extremely concerned about this. …The Tribunal had very serious concerns about the

Appellant's credibility, as previously indicated."

It is possible that the Tribunal has taken these claims too literally, perhaps failing to understand that (the appellant) referred to himself as a registered self-employed engineer but that this does not mean he was actively working as one. However, the Tribunal has noted references to his self-employment as an engineer in medical evidence dating from 2009 and 2010 which is roughly 9 or 10 years respectively after the accident. Would it not be reasonable, after 9 or 10 years without employment and with a claimed inability to return to work in the immediate future, for (the appellant) to refer to himself as 'unemployed' in official/medical documents?

The Tribunal has clearly questioned (the appellant's) credibility, with the foundation being the conflict regarding his self-employment. The Tribunal has proceeded on the evidence before it and has provided a meticulous account of its reasons for coming to the decision to award no additional points. It should also be noted that (the appellant's) credibility was additionally questioned due to further conflicts in his evidence, such as:

Mobility Reasons for Decision

"The medical report dated 5/1/11 indicated that he had been using crutches since the road traffic accident in 2000. He told the Healthcare Professional there that he could not face a journey in a car if he was going to attend a medical consultation. This, despite the fact that he had hurt his right knee playing football on 11/6/09, and, in addition, had returned from honeymoon on 7/5/10, having hurt his left ear in the swimming pool having travelled some distance on holiday as well."

The issue of credibility and how the Tribunal should explain its assessment of credibility was considered by a Tribunal of Commissioners in reported decision *R3/01(IB)T* where at paragraph 23 it was determined:

"A tribunal is entitled to exercise its judgement on the veracity of evidence put before it. In many instances it must do so to ascertain the facts. There is no rule that it must explain its assessment of credibility.

> *The only rule is that the reasons for the decision must make the decision comprehensible to a reasonable person reading it."*

I submit that in the current case the Tribunal has provided a detailed account of its assessment of credibility, likely beyond that envisaged by the Tribunal of Commissioners, and its reasons are comprehensible. For these reasons I submit that the Tribunal has not erred in law.

3rd Ground - The Tribunal formed a prejudicial view of (the appellant) and this led to an adverse decision.

The appellant was not present at the hearing on 28 January 2019. This hearing was previously adjourned on 14 October 2018. (The appellant)'s non-attendance at the hearing on 28 January 2019 was not agreed beforehand and there was also no confirmation provided that his representative would not be in attendance. Efforts were made to contact both parties by The Appeals Service on the day of the hearing and, after contact was made, it was noted that the accounts for non-attendance varied greatly. The Tribunal provided a lengthy summary of its belief that the Tribunal should proceed as it felt it would not be in the interests of justice to delay proceedings any further.

Mr Rafferty, on behalf of the appellant, contends that *"…the conclusion therefore by the Tribunal that the Appellant was "trying to manipulate the process and system to his advantage" was flawed and highly prejudicial and not supported by evidence."*

The Tribunal made the following observations in its reasons:

> *"…The Hearing had previously been postponed on 15/10/18. Postponements or adjournments are only granted in exceptional circumstances. The Tribunal was dealing with a period from 1/3/18, the longer the delay in a case, the more difficult it is to obtain cogent and relevant evidence. The Tribunal was of the view that the Appellant did not want to attend the Hearing given the numerous requests in his GP Records for home visits for the purposes of claiming benefits. The Appellant was fully aware of the Hearing when telephoned by*

the Clerk of the Tribunal, he said that 'something had come up' and the Solicitor was unavailable. This was clearly untrue. When the Solicitor was contacted, he said that he knew the Hearing was on. The Appellant had advised him, he had also received notification, there was no mention whatsoever of the Solicitor being unable to attend the Hearing, there was no request for an adjournment or postponement by the Solicitor, the Solicitor left it in the discretion of the Panel to proceed if it decided to do so, which is what the Panel decided. The Tribunal was of the firm view that to adjourn the Hearing would have been an abuse of the procedure of the Tribunal, the Tribunal was of the firm view that the Appellant had no intention at all of attending the Hearing, he was trying to manipulate the process and system to his advantage given that the payments of benefit would continue until his Appeal was determined. The Tribunal was not going to condone such conduct, and accordingly the Tribunal proceeded."

Based on the above I believe that the Tribunal was entitled to proceed with the hearing. It noted the imperative need to come to a decision as the case was almost one year old, that (the appellant's) account did not align with that of his solicitor/representative but that his solicitor/representative was under the impression the Tribunal should proceed and that, ultimately, it had the necessary powers to proceed instead of adjourn.

For these reasons I contend that the Tribunal has not erred in law.

4th Ground - The Tribunal did not give sufficient weight to medical evidence in support of his claimed functional restrictions, instead it misinterpreted the evidence and decided that he was working.

Mr Rafferty, on behalf of (the appellant), contends that the Tribunal did not give weight to medical evidence in support of (the appellant's) claimed functional restrictions. The failure to properly consider the available evidence led the Tribunal to mistakenly believe that (the appellant) was in regular employment after his accident in 2000.

Unfortunately Mr Rafferty has failed to provide examples of the relevant medical evidence that would have reinforced (the appellant's) claim. However I would note that the Tribunal recorded its consideration of the available evidence as outlined in the opening paragraph to its Mobility reasons:

> *"The Tribunal considered all the evidence in the case including the evidence in the Department's submission, the additional evidence provided by the Department as previously referred to, and the Appellant's GP Records, excerpts of which are recorded in the Record of Proceedings."*

The Tribunal has also noted that *"The Appellant had previously been in receipt of the High Rate Mobility component of Disability Living Allowance for many years."* The Tribunal has therefore considered its decision to not make an award against the background of an award of the previous benefit at the highest rate.

I have previously addressed the Tribunal's treatment of the evidence that (the appellant) was working in a self-employed capacity in my response to the *2nd Ground* of appeal and as Mr Rafferty has not provided any examples of the medical evidence that was overlooked to the detriment of his client, I cannot agree that the Tribunal has erred in law here.'

Analysis

14. I begin by considering aspects of the relationship between PIP and another social security benefit, Disability Living Allowance (DLA). In *MM-C v SSWP (CPIP)* ([2021] UKUT 183 (AAC) ('*MM-C*')) Upper Tribunal Judge Hemingway said the following at paragraphs 6 to 8 of the decision.

> 6. It has long been established that an F-tT has to provide adequate reasons for its decision on an appeal. Whilst a little more than that might be desired, adequacy, not more than that, is the standard. Where entitlement to a benefit is changed (particularly where it is reduced or extinguished) as a result of a decision on an appeal, there may in certain circumstances be an obligation, as part of the overall duty to give adequate reasons, to explain the change.
>
> 7. The classic analysis of the duty to give reasons where an award of a particular benefit changes may be found in *R(M) 1/96*. In that case the claimant had been in receipt of

mobility allowance but, on renewal, it was decided he was no longer entitled notwithstanding his claim to have suffered relevant deterioration. The Social Security Commissioner who decided that case said this:

> "15. It does however, seem to me to follow from what is said by the Court of Appeal in *Evans, Kitchen and Others* that while a previous award carries no entitlement to preferential treatment on a renewal claim for a continuing condition, the need to give reasons to explain the outcome of the case to the claimant means either that it must be reasonably obvious from the tribunal's findings why they are not renewing the previous award, or that some brief explanation must be given for what the claimant will otherwise perceive as unfair. This is particularly so where (as in the present and no doubt many other cases) the claimant points to the existence of his previous award and contends that his condition has remained the same, or worsened, since it was decided he met the conditions for benefit. An adverse decision without understandable reasons in such circumstances is bound to lead to a feeling of injustice and while tribunals may of course take different views on the effects of primary evidence, or reach different conclusions on the basis of further or more up to date evidence without being in error of law, I do not think it is imposing too great a burden on them to make sure that the reason for an apparent variation in the treatment of similar relevant facts appears from the record of their decision.
>
> 16. Relating this to attendance or mobility cases, if a tribunal, in a decision otherwise compliant with the requirements as to giving reasons and dealing with all relevant issues and contentions, records findings of fact on the basis of which it plainly appears that the conditions for benefit are no longer satisfied (e.g. a substantial reduction in attendance needs following a successful hip operation, or the claimant being observed to walk without discomfort for a long distance, then

> in my judgment it is no error of law for them to omit specific comment on an earlier decision awarding benefit for an earlier period. Their reason for a different decision is obvious from their finding. In cases where the reason does not appear obvious from the findings and reasons given for the actual conclusion reached, a short explanation should be given to show that the fact of the earlier award has been taken into account and that the tribunal have addressed their minds for example to any express or implied contention by the claimant that his condition is worse, or no better, than when he formally qualified for benefit. Merely to state a conclusion inconsistent with a previous decision, such as that the tribunal found the claimant "not virtually unable to walk" without stating the basis on which this conclusion was reached, should not be regarded as a sufficient explanation, and if the reason for differing from the previous decision does not appear or cannot be inferred with reasonable clarity from the tribunal's record, it will normally follow in my view that they will be in breach of regulation 26E(5) and in error of law".

8. In *SF v SSWP (PIP)* [2016] UKUT 0481 (AAC), which concerned a claimant who had originally been awarded PIP but had subsequently had that award taken away by way of a supersession decision, the Upper Tribunal made a strong statement to the effect that, in such circumstances, the principle in *R(M) 1/96* would apply. In *YM v SSWP (PIP)* [2018] UKUT 16 (AAC) the Upper Tribunal considered what the situation might be where, as here, a claimant had converted from DLA to PIP. It was said that, in such cases, the principle would potentially come into play in circumstances where there was a potential overlap between certain DLA tests and PIP tests such that in some cases there would be a need to explain "apparently divergent decisions". In *CH* and *KN*, a submission made on behalf of the Secretary of State to the effect that procedural and substantive differences between DLA and PIP meant any perception of inconsistency between awards would simply be a result of an individual's lack of understanding or appreciation of those differences, was rejected. Further, the approach taken in *YM* was approved in this way *"Accordingly, I agree with Judge*

> *Ward's approach at [21] of YM in setting out the principle but no rule of law beyond that. It is for the tribunal to judge in the circumstances of a particular case whether there is an apparent inconsistency such that reasons are called for"*. It was also stressed that the principle in *R(M) 1/96* and the Upper Tribunal's application of it to cases of conversion from DLA to PIP in *YM* "does not place an undue burden on the tribunal". It was pointed out that it had been made clear in *YM* that an F-tT was not required to engage in comparative reasoning for the difference between DLA and PIP awards and that "deciding whether there is a duty to provide the explanation does not call for a sophisticated approach". The overarching indication from these decisions is that, the duty to explain divergence where it arises, is not a demanding one and that a detailed analysis will not be called for. Further, and importantly given the way this case has been argued (see below), the duty is only to convey to a party, simply and clearly, why it is the F-tT has reached an outcome on the appeal before it which is apparently divergent. In terms of whether that duty, where it has arisen has been complied with, it does not matter that the claimant finds the explanation unpersuasive or disagrees with any reasoning or finding which underpins it. The only issue is whether the explanation is understandable.'

15. I accept and adopt that reasoning which, in my view, properly reflects the law in Northern Ireland.

16. Applying those principles to the present case, immediately prior to his requirement to make a claim to PIP, the appellant had an entitlement to DLA at a significant level and for a considerable time, namely the higher rate of the mobility component and the middle rate of the care component for the period from 9 April 2009 to 12 June 2018. The appeal tribunal was aware of this entitlement. It is mentioned in the submissions prepared for the appeal tribunal hearing and is referred to in the statement of reasons for the appeal tribunal's decision.

17. I pause here to note that the reference to the entitlement to DLA in the statement of reasons is in a context which is of concern to me. The appeal tribunal noted:

> 'The Tribunal also noted that the Solicitor indicated as follows, in Paragraph 1 of his letter:
>
> *' … that is, he received the appropriate amount of points of an award of Disability Living Allowance.'*

> Points are not awarded in awards of Disability Living Allowance, albeit that they are now awarded in Personal Independence Payment cases, so the Tribunal were at a loss to understand how the issue of points was relevant to the Appellant's previous award of Disability Living Allowance.'

18. I find that there is a degree of glibness to these comments. It is likely that the appellant's representative had little knowledge of the conditions of entitlement to DLA and was simply making the point that the appellant had an award of entitlement to that benefit immediately prior to the requirement to claim PIP. Further, the appeal tribunal had made other comments about the approach taken by the appellant's representative in the case including the representative's use of the term 'disclosure' and his seeking further details about a healthcare professional involved with the case and an audit process, describing the requests as being 'highly unusual'. In my view the appellant's representative was perfectly entitled to take the approach which he did.

19. The appeal tribunal was aware of the decisions in *CH* and *KN* and also made reference to the cases but in a different context to that set out above. The appeal tribunal noted:

> 'As was held in CH & KN 2018 UK UT, the Tribunal has a wide discretion in relation to requesting Disability Living Allowance evidence for the purpose of making an assessment for Personal Independence Payment.'

20. The *CH* & *KN* context which I have set out above is the duty on an appeal tribunal to explain divergence between decisions on entitlement to different social security benefits (in this case DLA & PIP) where such divergence arises. I return to that context and ask whether the statement of reasons for the appeal tribunal's decision is adequate to explain to the appellant why he was not now entitled to a disability-related social security benefit when for a lengthy period immediately prior to his claim to it, he was entitled to a parallel (and I put it no more strongly than that) disability-related social security benefit.

21. As Mr Arthurs has observed the appeal tribunal '… has clearly questioned the appellant's credibility, with the foundation being the conflict regarding his self-employment'. In the statement of reasons for its decision in respect of both components of PIP, the appeal tribunal stated the following:

> 'These statements of fact to the Assessor were clearly untrue. As previously indicated, the medical records clearly indicated that he was working as an Engineer, and in fact, was working in an Engineering capacity for many years, yet despite this and despite there being numerous references to this in the GP records, he has continually told

> medical assessors on behalf of the Department that he has not so worked. The tribunal was extremely concerned about this.
>
> …
>
> Having considered the totality of the evidence, the Tribunal did not believe that the Appellant was entitled to an award of Personal Independence Payment in respect of his Mobility needs at all. The Tribunal had very serious concerns about the Appellant's credibility, as previously indicated. It had no doubt whatsoever that he was continually working in an Engineering capacity, the exact extent of this could not be ascertained from the papers. However, the Tribunal believed that was employed in a full-time capacity in whatever guise, he had no difficulty whatsoever in mobilising whatsoever in getting out and about if he so desired. He had no difficulties whatsoever in planning and following journeys and had no difficulties whatsoever in moving around, and accordingly an award of points was not appropriate in respect of any of these activities.
>
> … the Tribunal had not the slightest doubt that the Appellant was not entitled to an award of Personal Independence Payment in respect of Daily Living Activities from 1/3/18, as it had, as previously indicated, very serious concerns about the Appellant's credibility.'

22. In many previous decisions, I have said the following about an adjudicating authority's assessment of the credibility of a claimant/appellant:

> 'In *C14/02-03(DLA)*, Commissioner Brown, at paragraph 11, stated:
>
> > ' … there is no universal rule that a Tribunal must always explain its assessment of credibility. It will usually be enough for a Tribunal to say that it does not believe a witness.'

Additionally, in *R3-01(IB)(T)*, a Tribunal of Commissioners, at paragraph 22 repeated what the duty is:

> 'We do not consider that there is any universal obligation on a Tribunal to explain its assessment of credibility. We disagree with *CSIB/459/*97 in that respect. There may of course be occasions when this is necessary but it is not an absolute rule that this must always be done. If a Tribunal

> makes clear that it does not believe a claimant's evidence or that it considers him to be exaggerating this will usually be sufficient. The Tribunal is not required to give reasons for its reasons. There may be situations when a further explanation will be required but the only standard is that the reasons should explain the decision. It will, however, normally be a sufficient explanation for rejecting an item of evidence, including evidence of a party to an appeal, to say that the witness is not believed or is exaggerating.'

This reasoning was confirmed in *CIS/4022/2007*. After analysing a series of authorities on the issue of the assessment of credibility, including *R3-01(IB)(T)*, the Deputy Commissioner (as he then was) summarised, at paragraph 52, as follows:

> 'In my assessment the fundamental principles to be derived from these cases and to be applied by tribunals where credibility is in issue may be summarised as follows: (1) there is no formal requirement that a claimant's evidence be corroborated – but, although it is not a prerequisite, corroborative evidence may well reinforce the claimant's evidence; (2) equally, there is no obligation on a tribunal simply to accept a claimant's evidence as credible; (3) the decision on credibility is a decision for the tribunal in the exercise of its judgment, weighing and taking into account all relevant considerations (e.g. the person's reliability, the internal consistency of their account, its consistency with other evidence, its inherent plausibility, etc, whilst bearing in mind that the bare-faced liar may appear wholly consistent and the truthful witness's account may have gaps and discrepancies, not least due to forgetfulness or mental health problems); (4) subject to the requirements of natural justice, there is no obligation on a tribunal to put a finding as to credibility to a party for comment before reaching a decision; (5) having arrived at its decision, there is no universal obligation on tribunals to explain assessments of credibility in every instance; (6) there is, however, an obligation on a tribunal to give adequate reasons for its decision, which may, depending on the circumstances, include a brief explanation as to why a particular piece of evidence has not been accepted. As the Northern Ireland Tribunal of Commissioners explained in R 3/01(IB)(T), ultimately "the only rule is that the reasons for the decision must make the decision comprehensible to a reasonable person reading it".

23. I would add, albeit in the most general of terms, that in assessing credibility, an adjudicating authority is entitled to take into account whether a claimant or appellant is working.

24. I have two concerns, however, with the manner in which the appeal tribunal has addressed the relevance of the appellant's relationship with work in assessing his credibility.

25. Firstly, and most significantly, and to repeat what was said above, about the key dates for the appeal tribunal in assessing potential entitlement to PIP were 1 March 2018 (the date of claim), 9 May 2018 (the date of the Departmental decision under appeal) and 28 January 2019 (the date of the appeal tribunal decision). In the statement of reasons for its decision, the appeal tribunal has made references to entries in the appellant's General Practitioner (GP) records which, it submitted supported the conclusion that the appellant was working and, accordingly, could not be believed. The earliest of these entries is in 2000 and the latest 22 February 2010. There are no further extracts referenced by the appeal tribunal. Re-emphasising that the key dates for the appeal tribunal were in 2018 and 2019, some 8 years after the last entry in the GP records which referenced work, I cannot agree that the appeal tribunal had a sound evidential basis for its conclusions that the appellant was '… continually working in an Engineering capacity' and '… was employed in a full-time capacity in whatever guise'.

26. I accept that the appeal tribunal has referred to other medical evidence which might have impacted on the appellant's potential entitlement to PIP but it is clear that the core basis on which it concluded that there was no such entitlement was a rejection of his credibility based on its conclusions that he was employed on a full-time capacity.

27. The second and more minor concern which I have with the appeal tribunal's assessments of the work-referenced entries in the GP records is that it is the case that medical and healthcare professions, particularly when assessing an individual for the first time, often do ask questions about employment, in the event that the injury or disease which they are asked to assess has a link to employment.

28. These conclusions are sufficient to dispose of the appeal and I do not have to consider the other grounds of appeal. I have no difficulty with the appeal tribunal's determination that there should be no adjournment of the appeal tribunal hearing. I have noted that in the statement of reasons for that determination, the appeal tribunal has stated:

> 'The Tribunal was of the firm view that the Appellant had no intention at all of attending the Hearing, he was trying to manipulate the process and system to his advantage given that payments of benefit would continue until his Appeal was determined. The Tribunal was not going to condone such conduct …'

29. I am of the view that there was no basis for the appeal tribunal to conclude that the appellant was 'trying to manipulate the appeal process and that the reason for so doing was that he could take advantage of the fact that payments of benefit to him would continue. I can understand how the appellant and his representative would consider that this was representative was, to a degree, but not the submitted degree, prejudicial.

Disposal

30. The decision of the appeal tribunal dated 28 January 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.

31. 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 9 May 2018, as revised on 20 June 2018 in which a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 1 March 2018;

    (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

14 December 2021