PMcK-v-Department for Communities (PIP) [2023] NICom 24

Decision No: C24/22-23(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 18 August 2022

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from the decision of a tribunal with reference BE/5976/21/03/D.

2. For the reasons I give below, I allow the appeal. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The appellant had previously been awarded disability living allowance (DLA) as a child from 17 May 2017, at the low rate of the mobility component and the middle rate of the care component. He claimed personal independence payment (PIP) from the Department for Communities (the Department) from 12 October 2020 on the basis of needs arising from diabetes and anxiety. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 9 November 2020. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received an audited report of the consultation on 28 January 2021. A supplementary advice note was obtained by the Department on 18 February 2021. On 24 February 2021 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 12 October 2020. The appellant's mother - his appointee - requested a reconsideration of the decision, submitting further evidence.

The appellant was notified that the decision had been reconsidered by the Department but not revised. He appealed.

4. The appeal was considered at a hearing on 18 August 2022 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 appellant then requested a statement of reasons for the tribunal's decision, and this was issued on 24 October 2022. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal and leave to appeal was granted by a determination of the salaried LQM issued on 26 January 2023. On 21 February 2023 the appellant lodged his appeal with the office of the Social Security Commissioners.

Grounds

5. The grounds on which leave to appeal has been granted are that the tribunal has arguably erred in law by failing to adequately address the issue of safety in relation to the management of the appellant's type 1 diabetes, referencing *LO'H v DFC* [2021] NI Comm 60. This ground is relied upon by the appellant, represented by Ms Rothwell-Hemsted of Law Centre NI.

6. In addition, the appellant renewed the application for leave on a number of other grounds, submitting that the tribunal had erred in law by:

   (i) failing to address the correct legal test regarding management of diet as therapy;

   (ii) failing to explain divergence between the PIP decision and the decision previously awarding DLA;

   (iii) giving weight to lack of diagnosis or medical treatment for anxiety rather than assessing functionality;

   (iv) failing to address the correct legal test in relation to engaging with others;

   (v) failing to apply the correct legal test or give reasons in relation to the activity of planning and following a journey.

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

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 applicant and a consultation report from the HCP. It had a letter from the appellant's representative, attaching extracts from medical records. It had a SENCO letter dated 4 October 2021 and a supplementary response from the HCP. Finally, it had a submission from the representative. The appointee attended the hearing and gave oral evidence, with the appellant remaining outside the tribunal room.

9. The tribunal noted that the appellant was an insulin-controlled diabetic, diagnosed at age 8, and that he had a history of sub-optimal control. The tribunal awarded 4 points for activity 1(e) (Preparing food) related to his need for support and supervision in relation to his diabetic diet. It further accepted that he required supervision to monitor his health condition, awarding 1 point for activity 3(b)(ii). However, it did not accept that he could not wash and bath independently or dress and undress independently. It accepted that he needed prompting for the purposes of activity 9(b). As it had awarded 7 points, this was below the threshold for the daily living component. It found that he could plan and follow a journey and that he had no mobilisation restrictions, awarding no points for mobility activities. It therefore disallowed the appeal.

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.

(2) C's ability to carry out an activity is to be assessed—

(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.

Assessment

13. The basis on which Mr Clements offers support for the appeal is set out in his observations in response to the submissions of Ms Rothwell-Hemsted, where he accepts in his response to the first ground advanced that it has merits. This is the same ground upon which the LQM has granted leave to appeal, namely, whether the tribunal applied the law correctly in the context of the requirements for a claimant to be able to carry out activities "safely" and "to an acceptable standard" under regulation 4(3) of the Personal Independence Payment Regulations (Northern Ireland) 2016. Mr Clements said:

"This ground primarily concerns daily living activity 4: washing and bathing. The tribunal said the following in its statement of reasons:

> *"In assessing the appellant's ability to carry out each of the activities the Tribunal had regard to the requirements of Regulation 4(3) of the Personal Independence Payment Regulations (Northern Ireland) 2016 which provides as follows:*
>
> *(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*
>
> *Accordingly, in coming to a decision the Tribunal took into account the appellant's ability to perform all of the disputed activities safely, to an acceptable standard, repeatedly, and within a reasonable timeframe."*

14. [The appellant]'s representative submits that the above statement was insufficient without addressing specific concerns raised relating to the safety and standard to which [the appellant] could complete particular activities. Ms Rothwell-Hemsted notes that the tribunal heard evidence from [the appellant] to the effect that he keeps the bathroom door open or unlocked while washing and bathing in case his blood sugar level gets too low and he has a hypoglycaemic episode. [The appellant] reported to the tribunal that this has happened "a few times" and that he has had to call for help on occasion. Another person is always in the house when he washes or bathes. He also has a fear of losing consciousness while showering. [The appellant]'s mother and appointee, [the appointee], also gave evidence to the effect that [the appellant] did not recognise when his blood sugar levels were getting too low until he started feeling shaky and disorientated.

15. In addition to the oral evidence heard by the tribunal, [the appointee] said the following in a letter to the Department dated 12 March 2021:

> "[*The appellant] is unsafe in the shower or bath. Hot water will lead to his blood sugars dropping dangerously low*

often needing to take glucogen to raise blood sugars. Therefore [he] is at risk of harm whilst showering or bathing. As a result he needs supervision, he will only shower when myself/carer is in the house, needing to leave the door open/unlocked so we can check he is safe and has not took a hypo, this can be very distressing for him."

16. The appellant's representative at the time, Bridget Corr of Law Centre NI, also made a written submission to the tribunal dated 28 February 2022 in which she cited a decision of a three-judge panel in the Upper Tribunal in Great Britain, *RJ, GMcL and CS v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 105 (AAC), and submitted that [the appellant] required supervision to be able to wash or bathe.

17. Ms Rothwell-Hemsted argues that the tribunal failed to consider and apply relevant case law. She cites *RJ* and the Upper Tribunal decision in *KT and SH v Secretary of State for Work and Pensions (PIP)* [2020] UKUT 252 (AAC). The Upper Tribunal said the following at [56] of *RJ* in respect of the meaning of "safely" and the need for supervision:

> *"56. In conclusion, the meaning of "safely" in regulation 4(2A) and as defined in regulation 4(4) is apparent when one considers the legislsation as a whole and with the assistance of the approach by the House of Lords to the likelihood of harm in the context of protecting people against future harm. An assessment that an activity cannot be carried out safely does not require that the occurrence of harm is "more likely than not". In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant. The same approach applies to the assessment of a need for supervision."*

18. [The appellant]'s representative also draws attention to paragraph [63] of *RJ*:

> *"63. CS had to remove her cochlear implant processors in order to bathe. Without the implants she was profoundly deaf and, she said, would not have been aware of a fire, burglary or other unexpected emergency which would normally be detected by sound. Thus it was necessary for someone to be present in the house in order to alert her should such an event occur. On our analysis of regulation 4 and "supervision", these facts would indicate that she needed supervision to bathe."*

19. Ms Rothwell-Hemsted further points out that in *KT* (in which both claimants had severe hearing impairments) counsel for both parties agreed that if the claimant was required to leave the bathroom door open while washing or bathing, they would not be washing or bathing "to an acceptable standard" (see [42] and [43] below):

> "*42. Mr Deakin for the Secretary of State had initially said that a finding was needed as to whether a "closed door" ("a running shower/closed door") would cause a person without a hearing impairment not to hear an alarm. I asked: If merely leaving the bathroom door open would enable the claimant to hear a typical alarm, did that mean that no aid or appliance is needed and no supervision is needed? If it would mean that, then potentially I would need to make a finding as to whether leaving the door open would enable each claimant to hear a typical alarm.*
>
> *43. Counsel jointly submitted in response as follows. If the claimant "were required to leave the bathroom door open while washing/bathing, [the claimant] would not be washing/bathing to an "acceptable standard"" as required by regulation 4(2A)(b) of the PIP regulations."*

20. Ms Rothwell-Hemsted submits that the "feared harm" in [the appellant]'s case is the risk to his health if he experiences a "low" (which I take to mean a hypoglycaemic episode) in the wet environment of a bathroom. She submits that the tribunal failed to consider the above case law and did not make an assessment as to whether there was a real possibility, that could not be ignored, of this risk materialising.

21. She additionally submits that the tribunal erred in concluding that the appellant could wash or bathe to an acceptable standard in light of the evidence that there was always someone else present in the house when he washed and/or bathed and that he left the bathroom door unlocked. Ms Rothwell-Hemsted observes that if the tribunal rejected this evidence it did not record this in its statement of reasons. She cites the recent decision *JT v Department for Communities (DLA)* [2023] NICom 2, where Commissioner Stockman said at [18]:

> "*18. I consider that the tribunal has not demonstrated that it has reached a decision in accordance with the evidence and explained that decision clearly to the parties, or for that matter to an independent third party such as myself. It is never enough to simply state that on the basis of the evidence the tribunal is satisfied that the appellant is not entitled to a benefit, when the tribunal's findings arising from that evidence have not been recorded. In this case, at the very least, the tribunal should have addressed whether it accepted or rejected the appointee's evidence and on what basis."*

22. I observe that the tribunal has not expressly referred to [the appellant]'s reported need for supervision to be able to wash or bathe at all in its statement of reasons. In the section titled "*4. Washing and bathing*" the tribunal mentions that [the appointee] reported [the appellant] needed prompting and encouragement to carry out this activity, but it is silent on his reported need for supervision to carry out this activity both in this section and elsewhere in the statement of reasons.

23. It is not apparent that the tribunal has addressed the submissions made on behalf of [the appellant] that he required supervision to be able to wash or bathe. There was, for the reasons outlined by his representative, at least an arguable case that [the appellant] engaged descriptor 4c ('*needs supervision or prompting to be able to wash or bathe'*) if the evidence given by himself and his mother was accepted by the tribunal although, as Ms Rothwell-Hemsted notes, it is unclear whether the tribunal did accept that evidence.

24. I therefore submit that the tribunal has not addressed all of the issues arising in the appeal. The tribunal was under a duty to address the principal arguments made by the parties and, by not expressly engaging with the argument put forth on behalf of [the appellant] that he needed supervision to be able to wash and bathe, I respectfully submit it has failed in this duty and thus has made a material error of law.

25. Ms Rothwell-Hemsted may be correct in her submission that the tribunal failed to consider relevant case law, but in my view this would depend on the basis on which the tribunal decided that [the appellant] did not require supervision in order to wash or bathe (if, for instance, it rejected the evidence given by [the appellant] and his appointee in respect of his need for supervision while washing or bathing there would be little point in considering *RJ* or *KT*). The tribunal has failed to address the issue entirely and so it is difficult to ascertain whether not expressly referring to the principles raised in the case law cited by Ms Rothwell-Hemsted is an error of law. However, the tribunal's overall failure to address [the appellant]'s argument is itself an error of law.

26. I agree with Ms Rothwell-Hemsted's submission concerning the tribunal's failure to indicate whether it accepted the evidence given by [the appellant] and his appointee in respect of his need for supervision while washing or bathing. The section titled '*4. Washing and bathing'* seems to be of little aid because it can be read as only addressing the arguments concerning [the appellant]'s motivation and his reported need for prompting. Earlier in the statement of reasons the tribunal said that, where there was a conflict in evidence, it preferred the report from the HCP (with the exception of the HCP's recommendation in respect of daily living activity 1). The HCP said in the report "*Whilst it is acknowledged the report indicates he has low blood sugar and is unable to detect when changes happen, the [functional history] does not indicate a significant safety risk due to this*". However, it is not apparent to me whether the tribunal rejected that [the appellant]

needed to wash and bathe when there was another person in the house and with the bathroom door unlocked due to the risk of a hypoglycaemic episode, or whether it accepted that evidence but nonetheless agreed with the healthcare professional that descriptor 4a was appropriate. I submit that the tribunal has a duty to explain the reasons for its decision clearly to the parties concerned and that, in this instance, it has failed to do so.

I do not necessarily agree with Ms Rothwell-Hemsted's submission that the tribunal erred in concluding that [the appellant] could wash and bathe unaided to an acceptable standard. The *KT* case (and the CS claimant in *RJ*) concerned claimants with severe hearing impairments who needed to wash and bathe with the bathroom door open so they could hear if a fire alarm went off, or if a burglary attempt occurred, etc. Even if it is accepted that [the appellant] needs to keep the bathroom door unlocked due to the risk of a hypoglycaemic episode, he may not need to keep the door open, and I would argue that washing and bathing with the bathroom door closed but unlocked can constitute washing and bathing to an acceptable standard. Nonetheless, this was a matter that the tribunal should have considered (provided it accepted the evidence given by [the appellant] and [the appointee]) and there is little indication in the statement of reasons that it did so".

27. The Department's submission, for the reasons submitted, accepts that the tribunal has erred in law. In essence, it accepts that the tribunal has failed to engage with the question of whether the appellant needed to leave a bathroom door open when washing or bathing in order to enable supervision to avoid danger from hypoglycaemic episodes. In such a context it did not address the question of whether the appellant was at risk of losing consciousness in a bath and drowning as a result, or perhaps falling in a shower and being injured. However, the issue of risk and the need for supervision had been raised in submissions before it.

28. Having considered the tribunal's findings in respect of washing and bathing, I accept that there is merit in Ms Rothwell-Hemsted's submission and I consider that the support of Mr Clements is appropriate. Whereas the tribunal engaged with the issue of prompting and encouragement to look after hygiene needs, it did not engage with the issue of risks and whether there was any need for supervision. In the absence of any finding on this issue, it has based its conclusions on insufficient evidence, and/or has failed to give adequate reasons for this aspect of the decision, as per *LO'L v DfC*. For these reasons, I accept that it erred in law.

29. As I am allowing the appeal on this ground, I do not need to consider the remaining grounds of application and will not address them in this decision.

30. I allow the appeal and I set aside the decision of the appeal tribunal. The question of whether there is any risk to the appellant when washing or bathing, and whether he requires supervision to avoid any such risk, is a question of fact which is not necessarily accepted by the Department as falling in the appellant's favour. I cannot determine this issue myself from

the evidence before me and consider that it is best determined by an appropriately constituted tribunal. Therefore, I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

6 July 2023