MH-v-Department for Communities (PIP) [2023] NICom 9

Decision No: C6/21-22(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 23 September 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 23 September 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.

3. 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.

4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of her 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

5. On 10 December 2018 a decision maker of the Department decided that the appellant was entitled to the standard rate of both the mobility and daily living components of PIP from 9 January 2019 to 19 November 2024. Following a request to that effect, the decision dated 10 December 2019 was reconsidered on 30 January 2019 but was not changed. An appeal against the decision dated 10 December 2018 was received in the Department on 27 February 2019.

6. The appeal tribunal hearing took place on 23 September 2019. The appellant was present and was represented by Ms Rigney. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 10 December 2018.

7. An application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS) on 15 July 2020. The application was received outside of the prescribed time limits for making such an application. On 18 August 2020 the Legally Qualified Panel Member (LQPM) determined that special reasons existed for extending the time limit and accepted the application. On the same date the LQPM refused the application for leave to appeal.

Proceedings before the Social Security Commissioner

8. On 13 October 2020 a further application for leave to appeal was received in the office of the Social Security Commissioners. The appellant was represented in this application by Mr McGuinness. On 27 October 2020 observations on the application were requested from Decision Making Services (DMS). In written observations dated 23 November 2020, Ms Patterson, for DMS supported the application for leave to appeal on one of the grounds advanced on behalf of the appellant. The written observations were shared with the appellant and Mr McGuinness on 23 November 2020.

9. On 14 June 2021 I granted leave to appeal. I gave, as a reason, that it was arguable that the appeal tribunal had failed to apply the principles in *TK v Department for Social Development (DLA)* ([2010] NICom 41).

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');
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> (ii) failing to give reasons or any adequate reasons for findings on material matters;
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> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
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> (iv) giving weight to immaterial matters;
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> (v) making a material misdirection of law on any material matter;
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> (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; …
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> 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."

Analysis

12. In her written observations on the application for leave to appeal, Ms Patterson stated the following:

> 'Regarding physical observations made by a tribunal at a hearing, GB decision ID v SSWP [2015] UKUT 692 (AAC) as cited by the applicant's representative, holds the following at paragraph 11:
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> > *'11. In R (DLA) 8/06 Commissioner Jacobs summarised the principles as to reliance by tribunals on observations made at hearings. I summarise these further as follows:*
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> > *a, A tribunal may take into account observations made at a hearing.*

b, An observation must be relevant to an issue of fact that is before the tribunal and to the time of the decision under appeal, and must be reliable as evidence of the claimant's disablement at the relevant time rather than only a snapshot on a particular day.

c, The tribunal must assess the significance of observations in the context of the evidence as a whole, and it may be necessary to make further enquiries arising from or in relation to an observation.

d, A failure to allow a claimant to comment on a tribunal's observations may be a breach of the tribunal's inquisitorial function or of its duty to ensure that the parties have a fair hearing.

e, If an observation is used purely as confirmation of a conclusion that the tribunal would have reached anyway, there is no need for a tribunal to investigate it further or for the claimant to have a chance to comment on it.

f, However, if an observation is one of the factors taken into account in reaching a conclusion, any failure in the tribunal's inquisitorial duty or violation of the right to a fair hearing will mean that the decision is wrong in law.'

The relevant date in (the appellant's) case is 12/12/18, the date of the Department's decision. The appeal hearing took place on 23/9/19, when (the appellant) was in attendance along with her then representative.

Paragraph 19 of the Statement of Reasons holds:

'We note that during the assessment, the HCP noted that the Appellant's mood was mildly low and although she had become upset when discussing her father and her history of depression, there were no observations of overwhelming anxiety at assessment. This is consistent with our observations during the oral hearing. We noted that the Appellant did become tearful

> *as she was leaving but we found that this was because we had questioned her about entries in her GP notes as opposed to a reflection of her general mood.'*

I would contend that the tribunal here has merely referenced its observations as confirmation of conclusions it would have reached anyway and that it has met the standard of 'ID'.

I also note the following extract from the end of the tribunal's Record of Proceedings, where the tribunal makes an observation:

> *'Appellant needs support to get up, grimaces as if experiencing pain on getting up and is in tears leaving. She is dragging her right leg and left was ok on the way in.'*

At paragraph 26 of the tribunal's Statement of Reasons the tribunal address this:

> *'We were not convinced that the grimacing the Appellant conveyed as she stood up after the hearing was credible; our observation was that she did not appear to be in severe pain as she mobilised out of the hearing room.'*

Looking at this in line with the standard for tribunals expounded in the 'ID' decision, I would be concerned that the tribunal may have erred in law here. The appeal hearing took place 9 months after the decision was given, and in her oral account (the appellant) has stated that her condition has improved since then. The Tribunal has doubted (the appellant's) credibility which I have contended it is entitled to do, however I do not think it has made clear that this observation is relevant to the date of the decision under appeal. Article 13(8)(b) prohibits a tribunal from taking account of circumstances that do not obtain at the time of the decision.

Another issue to note again is whether the tribunal's observations merely confirmed the findings it had made, which were based on other factors such as the medical evidence and (the appellant's) statements, or whether this observation was one of the factors taken into account in reaching its conclusions.

> The context here being the tribunal's conclusions in regard to (the appellant's) ability to perform the activity 'Moving Around', the preceding paragraphs (22 onwards) set out the tribunal's reasons - what factors it considered and which evidence it placed weight on. The tribunal first acknowledge that (the appellant) has significant issues with her back, citing evidence held in connection with her previous award of Disability Living Allowance ('back pain with radiological evidence of degenerative disc changes and disc prolapse'). The tribunal also notes that (the appellant) uses a three pronged rotator to mobilise and holds a blue mobility badge. The tribunal note (the appellant's) contention (in her PIP2, at assessment, in a note dated 24/4/18 and at the oral hearing) that her walking distance is less than 20 metres, using an aid and with extreme pain.
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> The Tribunal found that, based on GP notes which included a letter from her physiotherapist, that (the appellant) was found to require the use of a crutch in order to move around, and that she had not been found to require a wheelchair. The Tribunal then address (the appellant's) report of a history of falls in relation to her ability to perform the activity safely and make the finding that she is able to balance safely when mobilising using her rotator.
>
> It would appear to me that the Tribunal's reasons are thorough, however I would agree with (the appellant's) representative that it should have put the observations it made to her, because it appears to have been a building block in coming to its conclusion regarding her ability in the activity of 'Moving Around'. Although this observation was made as she left the room, I do not think it was within the tribunal's entitlement to consider this observation without having put it to her. Consequently, I agree that the tribunal erred in law.'

13. I am in agreement with the submissions made by Ms Patterson in connection with the manner in which the appeal tribunal dealt with its observations of the appellant during the course of the oral hearing of the appeal.

14. The legal principles concerning the extent to which an appeal tribunal may take into account its observations of an appellant at an oral hearing are clear. At paragraph 27 of reported decision *R3/01(IB)(T)* a Tribunal of Commissioners stated:

> "….we would state that a Tribunal can use its own observations in reaching an assessment of credibility. It is, however, strongly desirable that a Tribunal seek a

comment from the parties on specific observations of activity as opposed to a more generalised impression of the witness. Comment on observations can be sought in an uncontroversial manner and it is up to the Tribunal whether or not it accepts any explanation which is given. A Tribunal will not necessarily be in error if it does not seek such an explanation but it is much less likely to err if it does so. It may, of course be in error if the observations raise a fresh issue not already in contention and the Tribunal does not seek comment on them. For example, if an Examining Medical Doctor opines that a claimant always has to hold on when rising from a chair and the decision maker so accepts and awards points accordingly and the Tribunal observes the claimant to rise without holding on, it must mention the observations and seek comment. Whether or not it accepts the explanation given is a matter for the Tribunal."

In paragraphs 16 and 17 of R(DLA)8/06 Commissioner Jacobs stated:

> "16. An observation can only be taken into account if it is reliable. The problem with an observation is that it is a limited snapshot on a particular day. It may not give a reliable picture of the claimant's disablement…"
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> 17. The significance of an observation can only be assessed in the context of the evidence as a whole and the evidence may have to include the result of further inquiries into the issues of relevance and reliability…."

15. In *R1/01(IB)(T)*, a Tribunal of Commissioners stated, at paragraph 13:

> '… we wish to deal with one point. In paragraphs 21 to 24 of decision *R 4/99 (IB***),** Mrs Commissioner Brown held that a Tribunal, like any other adjudicating body, is entitled to use all its senses in assessing the evidence before it and may take account of what it sees as well as hears. She referred to decision *CDLA/021/1994* (now reported as *R(DLA)1/95),* in which a Great Britain Commissioner, Mr Commissioner Skinner, said: -
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> > "… The tribunal are precluded from conducting a walking test or making a medical examination of the claimant. However, it does not appear to me that the tribunal's ocular observation of the claimant can be said to amount to a physical examination, nor can it be said that the claimant has been required to undergo any physical test. It does not seem to me that the

> tribunal [*which took into account observations made by the members during the hearing*] were in breach of the prohibition contained in the section. I have considered whether the reliance by the members of the tribunal on their own observation of the claimant may be objectionable on other grounds. It seems to me that a tribunal are entitled to have regard to what they see provided that the weight to be attached is considered carefully. …"

We agree with those views. In the context of a Tribunal hearing, sight is one of the more important senses. Observing the manner in which a witness gives his or her evidence and how he or she behaves or responds at other times is an important part of the process. Witness A may be wholly convincing while everyone who listens to and observes witness B soon becomes certain that he or she is lying. A Tribunal must, of course, consider its observations carefully and judiciously. The neatly dressed man who has said he is unable to look after himself may be lying. On the other hand, the Tribunal may be seeing the results of extensive efforts by his family or friends to tidy him up for the hearing. Further, a Tribunal which is going to base its decision, or an important part of its decision, on what it has seen should usually put its observations to the claimant and thereby give him an opportunity to comment. It will then be for the Tribunal to accept or reject the comments. Whether or not this is necessary will depend in a large measure on whether the Tribunal's observations raise a new issue or constitute fresh evidence or whether they merely confirm existing evidence.'

16. Having found that there was a procedural irregularity which was capable of making a material difference to the outcome or the fairness of the proceedings, I do not have to consider the appellant's other grounds for appealing. I would indicate, however, that I would not have found the decision of the appeal tribunal to be in error of law on the other grounds raised on behalf of the appellant.

Disposal

17. The decision of the appeal tribunal dated 23 September 2019 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.

18. 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 10 December 2018 in which a decision maker of the Department decided that the appellant was entitled to the standard rate of both the mobility and daily living components of PIP from 9 January 2019 to 19 November 2024;

    (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) the appellant will wish to consider what was said at paragraph 34 of *DP-v-Department for Communities (PIP)* ([2020] NICom 1) concerning the powers available to the appeal tribunal and the appellant's options in relation to those powers;

    (iv) 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

    (v) 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

22 February 2023