RMcR-v-Department for Communities (PIP) [2019] NICom 69

Decision No: C19/19-20(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 3 May 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The appeal is allowed. The decision of the appeal tribunal sitting at Downpatrick on 3 May 2018 under reference DP/8362/17/03/D involved the making of errors of law and is set aside.

2. I remit the case to a panel of the appeal tribunal which must be entirely differently constituted to determine the matter afresh in accordance with the Directions at para 17 below.

REASONS

3. The appellant appealed against a decision dated 19 September 2017 which had awarded her 0 points in respect of the daily living component and 4 in respect of the mobility component, so her claim for personal independence payment (PIP) failed.

4. Her disabling conditions were said to be post-traumatic stress disorder (PTSD), Chronic Obstructive Pulmonary Disease (COPD) and acute chest pain, depression and high blood pressure.

5. She had previously been in receipt of disability living allowance (DLA) from October 2013 to October 2015 and from October 2015 to October 2017, receiving the lower rate of the mobility component and the middle rate of the care component.

6. The appellant indicated that she did not wish to attend the appeal tribunal, explaining that this was due to the consequences of her PTSD, and (initially) that there was a part of her medical records which she did

not wish disclosed to the tribunal. She gave the names and addresses of two people, Dr B… and Dr P…, and their roles in treating her. A request for medical notes was sent in form AT16 to Dr P…, on the erroneous footing that he was her GP (he is in fact a consultant clinical psychologist). Dr P… replied, indicating that he could not release the notes as his patient, the appellant, had withheld consent. He did however complete the rest of the form which asks for details of present and past complaints, clinical findings and treatment.

7. The appeal tribunal had the completed AT16 before it. It noted that there had already been one adjournment to give the appellant an additional chance to attend, which she had not taken up, and decided to go ahead on the material it had. It indicated that it awarded 0 points in respect of each component, but subsequently purported via its statement of reasons to correct the number of points for mobility activity 2 to 4.

8. The appellant sought leave to appeal, complaining in summary that the disability assessor had failed to take into account the impact of her conditions, that she had only answered the questions she had been asked by the assessor, with the consequence that the evidence base was incomplete and that her condition had got worse over the last three years.

9. The Department, when asked for a submission on the application for leave to appeal, resisted the application. However, it became apparent to me that Form AT16 was not on the Commissioners' file and thus had not been before the Department's recent submission writer either. Having caused it to be obtained, I considered that leave should be given, not on the grounds as formulated by the appellant herself (though I took them into account) but on the grounds below (I have added numbering to facilitate this decision):

   Ground 1

   Did the tribunal err in law by making a mistake as to Dr P…'s professional role and so failing to have a reliable basis for evaluating his evidence in the AT16? Contrary to what the tribunal said in section 2 of its decision, Dr P… is not the "Appellant's GP". Rather, as the appellant indicated on the consent form, his role was as "Trauma CBT Dept Therapist", whom she was usually seeing weekly. She had also referred to the existence of such arrangements for therapy on her claim form and to Dr P…'s role in her letter of 2/10/18. The appellant could not have had two GPs in different places and particulars of Dr B…, who is in fact her GP, were also given. Did the tribunal overlook this evidence or fail adequately to take it into account? […]

   Ground 2

   Did the tribunal err in law by failing sufficiently to address (including beyond the mention in relation to "engaging socially") what should be

made of the fact that the appellant has what was described (by, as is now evident, an apparently specialist source) as a "moderately severe form of PTSD", resulting in support from clinical psychologists and psychiatry (at first sight a relatively high level of input)?

Ground 3

Did the tribunal err in law by failing to make a finding as to when PTSD was diagnosed? The AT16 may have been ambiguous in that regard, but there was evidence (in the history taken by the assessor, at Q2a of the claim form and in the printout of medical records) that it had not been diagnosed until 2016. If that was so, the existence of a long undiagnosed condition, only latterly being treated at the date of decision, appears capable of being relevant to the tribunal's decision. It also appears capable of bearing on the weight to be given to the report of Dr McC… dated 18 December 2015, necessarily given in ignorance of the condition.

Ground 4

Did the tribunal err in law by considering chest pain only in relation to the COPD when the evidence included that the appellant's chest pain was one manifestation of her PTSD (see p4 of assessor's report and answer to Q8c on claim form)?

Ground 5

Did the tribunal err by failing to deal adequately with the previous award of DLA? It appears there had been an initial award, then a subsequent renewal, so the Department had on two occasions concluded that the appellant did meet the requirements for that benefit. The evidence does not disclose (as it should) the basis of the award of the care component, but if it was for day attention or supervision, there may be some read-across to PIP requirements. Similarly, the appellant had been in receipt of lower rate mobility component (for requiring guidance or supervision to take advantage of the faculty of walking out of doors): the tribunal does not, at any rate in terms, attempt to reconcile this with its [initial] conclusion that 0 points should be awarded in respect of the mobility descriptors. In those circumstances, did the appeal tribunal err in law by failing to explain what it made of the previous awards of DLA?

Ground 6

Did the tribunal err in law by failing to consider the generally debilitating effect of the PTSD as claimed by the appellant in her response dated 19/4/18 to the tribunal's hearing enquiry form on her ability to carry out the various PIP activities to the standards in reg 4[(3)] of the PIP Regulations?

Ground 7:

Did the tribunal err in law by deciding to go ahead in the absence of the appellant when her non-attendance appeared related to her underlying conditions, without considering alternatives such as a telephone hearing or formulating questions for her to answer in writing (notably about the effects of the PTSD on her)? She had told the assessor that PTSD affected her ability to wash, dress, eat, sleep, cook and go out, yet when it came to the assessor's analysis of the particular activities, PTSD is barely, if at all, referred to.

Ground 8:

Did the tribunal err in law in the final paragraph of its decision? A person with issues such as low mood, negative thinking and self-esteem and confidence issues may well need "prompting" or "social support". The tribunal's reliance on the appellant's ability to engage with professionals (something over which she may have had no choice if she needed treatment and who may themselves in the course of treatment provide prompting or social support) appears arguably perverse.

10. The Department does not support the appeal on Grounds 3, 5 and 7. It is silent as to Ground 6. Grounds 1, 2 ,4 and 8 are overtly supported. The appellant, while understandably content with the support for the appeal now given, would prefer the decision to be remade if possible.

11. Grounds 1 and 2 are linked. As the Department's submission writer notes:

> "The Tribunal's statement that 'Dr P… describes the Appellant as suffering from a moderately severe form of PTSD and in view of this the Tribunal do accept that at times the Appellant might be anxious for example in initially meeting and engaging with strangers' appears incongruous ["non-congruent" may have been intended] with Dr P…'s assessment, and particularly with consideration of the high level of specialist input and frequency of appointments he has with [the Appellant]."

The Department further accept that the appellant's letter of 19 April 2018, in which she set out the effects of her PTSD on her, did not receive due consideration, bearing in mind the existence of the "moderately severe form of PTSD" had been validated by an appropriate specialist.

12. Ground 4 is supported on the basis that the Tribunal focused primaily on the chest pain caused by COPD and erred in giving insufficient consideration to the exacerbating effects of her PTSD on her chest pains, a shortcoming which ties in with the original mis-identification of Dr P… and the Tribunal's understanding as to the degree by which the appellant is affected by this condition.

13. Ground 8 is supported on the basis that:

> "Engaging with specialist services an appellant has been referred to does not indicate that appellant does not have limitation in the specified activity. […It] is very possible that the healthcare professionals [the appellant] has been able to engage with provide social support in the course of their appointments with her. It is also possible that she would require prompting in order to attend appointments and that she attends under duress but in the interest of improving her health. The medical assessment for PIP took place in [the appellant's] home and in her subsequent letters she has stated she felt very nervous at the prospect of engaging with the healthcare professional. I would contend that descriptors b or c could be applicable in this activity (needs prompting, or needs social support to be able to engage with other people). […]. I would contend that the Tribunal's reasoning here is insufficient and that this could constitute an error in law."

14. Turning briefly to the grounds on which the appeal is not supported, as to Ground 3, the tribunal did recite various pieces of evidence, recording that some do mention PTSD, while others do not. However, reciting evidence is not a substitute for making a finding. Had it made a finding, it could have been material for the reasons I gave when granting leave. This was, accordingly, a further error of law.

15. As the appeal tribunal's decision is being set aside I need not say more about whether the appeal tribunal erred on Grounds 5, 6 and 7, which in any event I address in my Directions in order to minimise the risk of a further appeal.

16. I do not consider it appropriate to remake the decision. The appeal tribunal has, as well as a legally qualified member, members who have specialist experience in medical and disability matters, and will be able to give rounded consideration to the case. Further, I have not given up hope that the appeal tribunal might be able to find a way by which the appellant could give evidence in person, either by physical attendance or, if that is precluded by her condition, over the telephone.

17. I direct that:

    a. the appellant must within 28 days of the date of the letter issuing this decision notify the appeal tribunal whether she seeks an oral hearing in person or, in the light of her conditions, would prefer – if it can be arranged – a telephone hearing or is content for her appeal to be determined on the papers. (While this is not to be understood as part of the Direction, I encourage her to seek a way of giving oral evidence to the appeal tribunal, as it is usually helpful for a tribunal to

hear direct from a person about relevant difficulties they were experiencing around the time of the Department's decision);

b. the question of whether the appellant satisfies the conditions of entitlement for personal independence payment is to be looked at by way of a complete re-hearing in accordance with the legislation and this decision;

c. unless otherwise directed, the appellant or any representative she may have must ensure that any further written evidence is filed with the appeal tribunal within 42 days of the date of the letter issuing this decision;

d. the tribunal will need to make full findings of fact on all points that are put at issue by the appeal. Whilst the appeal tribunal will not need reminding, this must include findings to enable the tests in reg 4(3) of the Personal Independence Payment Regulations (Northern Ireland) 2016 to be applied;

e. the tribunal must not take account of circumstances that were not obtaining at the time of the Department's decision under appeal, which was taken on 19 September 2017- but may have regard to subsequent evidence or subsequent events for the purpose of drawing inferences as to the circumstances obtaining at that time: R (DLA) 2/01 and 3/01; and

f. in its treatment of the previous award of DLA, the tribunal should be guided by *CH and KN v SSWP* [2018] UKUT 330 (AAC).

18. These directions are subject to any further directions which may be given by an authorised legally qualified panel member of the appeal tribunal or its President.

19. The decision on the re-hearing is a matter for the appeal tribunal and no inference as to the outcome should be drawn from the fact that this appeal has been allowed on a point of law.

(signed): C G Ward

Deputy Commissioner (NI)

5 November 2019