

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 12 December 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 12 December 2018 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. 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 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

5. On 8 March 2018 a decision maker of the Department decided that the appellant was entitled to the standard rate of the daily living and mobility components of PIP for a fixed period from 11 April 2018 to 12 February 2020. Following a request to that effect the decision dated 8 March 2018 was reconsidered on 22 March 2018 but was not changed. An appeal against the decision dated 8 March 2018 was received in the Department on 25 April 2018. The appeal was received outside of the prescribed time limits for making an appeal but was, nonetheless, accepted by the Department.
6. The appeal tribunal hearing took place on 12 December 2018. The appellant was present and was represented by Mr O'Farrell of the Citizens Advice organisation. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 8 March 2018.
7. On 14 May 2019 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 28 May 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 10 June 2019 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 9 July 2019 observations on the application were requested from Decision Making Services (DMS). In written observations dated 6 August 2019, Ms Patterson, for DMS, supported the application for leave to appeal. Written observations were shared with the appellant and Mr O'Farrell on 6 August 2019. On 14 August 2019 e-mail correspondence was received from Mr O'Farrell in which he indicated that in light of the agreement by the Department that the decision of the appeal tribunal was in error of law he had no further comments to make.
9. On 7 October 2019 I granted leave to appeal. When granting leave to appeal I gave as a reason that the grounds of appeal, as set out in the application for leave to appeal, were arguable. On the same dated 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 appellant made the following submissions:

‘It is very clear from the Record of Proceedings that Doctor C, the Medically Qualified Member, asked me how far I could walk before the surgery using a distance of 16 metres to the toilet as a guide. I said “I could have gone a bit farther, I could have gone half of that again.” (This would equate to 24 metres) Doctor C then asked “After 7

weeks – how had you progressed?” naturally enough I took this to mean the seven weeks after the date of the surgery on 26th January 2018 because this takes you to 8th March 2018 i.e. the date of Decision under appeal. My answer was “Sometimes I can only go to the driveway and let the dog go out herself. Sometimes I can go further -16-18m. My leg gives me bother, I can’t move on.” When asked if I could go another 16 metres I replied “No, it would be that painful I would have to go back.” Later Ms G, the Legally Qualified Member, asked “Do you walk the dog at the moment?” I took that to mean 12th December 2018, the date of the actual Hearing. I was also asked “How long do you go out for? And I replied “5-7 minutes”.

I respectfully submit that the Tribunal made absolutely no findings of fact with regard to the Activity of Moving Around at the date of the Decision under Appeal i.e. 8th March 2018. The distance of 24 metres clearly refers to the period before 26th January 2018 and the reference to 5-7 minutes is within the context of taking the dog out in December 2018 and specifically relating to how long I was out for and not how far I could walk in terms of minutes as opposed to distance. Furthermore it is my contention that my actual walking distance at the date of Decision under Appeal i.e. 8th March 2018 was 16-18 metres. Therefore the Tribunal have misdirected themselves in deciding “ ... the Appellant can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres” and awarded 10 points under 2(d) for Moving Around (Schedule 1, Part 3, Personal Independence Payment Regulations (NI) 2016).’

13. As was noted above, in her written observations on the application for leave to appeal, Ms Patterson supported this ground of appeal.

Analysis

14. To be fair to the appeal tribunal, it is clear that it was alert to three dates of significance. The first was 26 January 2018 which was the date on which the appellant had his knee replacement surgery. The second was 8 March 2018 which was the date of the decision under appeal and some six weeks after the date of the surgery. The third was 12 December 2018 which was the date of the appeal tribunal hearing.
15. Article 13(8)(b) of the Social Security (Northern Ireland) Order 1998 provides –

‘(8) In deciding an appeal under this Article, an appeal tribunal –

(a)

(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.'

16. In *C24/03-04(DLA)*, at paragraph 8, the Commissioner approved of the following statement of law set out in paragraph 9 of *R(DLA) 2/01*:

'... In the case of a claim for a Disability Living Allowance, the jurisdiction {of an Appeal Tribunal} is limited to the inclusive period from the date of claim to the date of the decision under appeal. The only evidence that is relevant is evidence that relates to the period over which the tribunal has jurisdiction. However it is the time to which the evidence relates that is significant, not the date when the evidence was written or given. It does not limit the tribunal to the evidence that was before the officer who made the decision. It does not limit the tribunal to evidence that was in existence at that date. If evidence is written or given after the date of the decision under appeal, the tribunal must determine the time to which it relates. If it relates to the relevant period, it is admissible. If it relates to a later time it is not admissible.'

17. Although those principles were expounded in the context of Disability Living Allowance, they are equally applicable to the appeal tribunal's jurisdiction in respect of other social security benefits including PIP.

18. It is equally obvious that the members of the appeal tribunal tailored their questions concerning limitations on the appellant's mobility or, for the purpose of the relevant legislative provisions, his ability to 'move around' around his limitations on each of those specific dates. Further, the appellant was alert to the relevance of particular distances to scoring points for specific descriptors under the 'Moving around' activity. For example, he gave evidence, which was not contradicted that he had measured the distance to the toilet and that it was 16 metres.

19. In the statement of reasons for the appeal tribunal's decision, the following conclusions with respect to the activity of 'Moving around' were noted:

'The tribunal takes account of the evidence that at the date of the decision the Appellant was recovering from right knee replacement surgery. His recovery has been slow and he is awaiting a left knee replacement. He has a blue badge. He uses a crutch. We accept his oral evidence

that he can walk for 16 metres and then half of that again with a crutch, a distance of about 24 metres. This is consistent with his evidence that he takes the dog out most evenings for about 5-7 minutes. The Tribunal accepts that this evidence is consistent with the medical evidence. The Tribunal concludes on the basis of the evidence that the Appellant can stand and then move using an aid or appliance more than 20 metres but no more than 50 metres.'

20. There are two aspects of that reasoning which are problematic. The first is that the appellant's evidence that he could '... walk for 16 metres and then half of that again with a crutch, a distance of about 24 metres' was given in response to a question about the limitations on his mobility before the date of his knee replacement surgery. His evidence about his limitations at the date of the decision under appeal, that is seven weeks after the date of the surgery and in or around the date of the decision under appeal, was that he could sometimes only go as far as the driveway but that he could sometimes go further i.e. a distance of 16 to 18 metres. If this evidence was accepted, and it would seem that the appeal tribunal did not doubt it, then as of the date of the decision under appeal, the maximum distance which the appellant could manage was 16 to 18 metres.
21. The second problematic aspect of the appeal tribunal's reasoning is that the evidence concerning the length of time which he spent 'out' with the dog was asked in the context of 'at the moment' which was clearly as of the date of the appeal tribunal hearing. The appeal tribunal has not undertaken the exercise mandated in *R(DLA) 2/01* to relate that evidence to the relevant period. Further, the appeal tribunal has not explored whether the time of 5 to 7 minutes spent 'out', and on which the appeal tribunal relied, was all taken up with 'moving around' or whether, for example, the appellant simply stood while the dog did its own thing. Given the appellant's other recorded evidence that he went '... out of the park where there is a green and a big field across the road' it is likely that much of the 5 to 7 minutes was taken up with moving around.'
22. I agree, therefore, that the appeal tribunal's approach to the evidence in connection with the potential application of the 'Moving around' activity was flawed and that, as a consequence the appeal tribunal's decision is in error of law. I set aside the decision of the appeal tribunal but with a degree of reluctance given its judicious consideration of the other issues arising in the appeal and the otherwise carefully prepared statement of reasons.

Disposal

23. The decision of the appeal tribunal dated 12 December 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.

24. 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 8 March 2018 a decision maker of the Department decided that the appellant was entitled to the standard rate of the daily living and mobility components of PIP for a fixed period from 11 April 2018 to 12 February 2020;

(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 appeal tribunal to which the appeal is being referred should note that the decision of the appeal tribunal which I have set aside made an award of entitlement to the standard rate of the daily living and mobility components of PIP from 11 April 2018 to 12 February 2020. The period of that award has now almost expired but the award itself remains relevant in that if the newly constituted appeal tribunal to which the appeal is being referred makes a further positive decision on entitlement to the daily living or mobility components, any such award must be deemed to be on account of the award already made;

(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

26 February 2020