MMcC-v-Department for Communities (PIP) [2021] NICom 11

Decision No: C44/20-21(PIP)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 25 June 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference LD/2596/19/02/D.

2. For the reasons I give below, I grant leave to appeal. I allow the appeal and set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The applicant had a previous award of disability living allowance (DLA) from 29 April 2003, most recently at the low rate of the mobility component and the middle rate of the care component. As her award of DLA was due to terminate under the Welfare Reform (NI) Order 2015, she was invited to claim personal independence payment (PIP) from the Department for Communities (the Department). She claimed PIP from 4 September 2018 on the basis of needs arising from diabetes, depression, anxiety, panic attacks, elbow pain, high cholesterol, high blood pressure and frequent hypos.

4. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 15 October 2018. The applicant was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the

Department on 3 December 2018. The Department obtained a general practitioner (GP) factual report dated 1 March 2005, prepared for the purposes of her previous DLA claim. On 7 December 2018 the Department decided that the applicant satisfied the conditions of entitlement for the standard daily living component, but did not satisfy the conditions of entitlement to the mobility component from and including 4 September 2018. The applicant requested a reconsideration of the decision. She was notified that the decision had been reconsidered by the Department but not revised. She appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal maintained the award of standard rate daily living component and disallowed the appeal relating to mobility component. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 8 October 2019. The applicant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 29 November 2019. On 13 December 2019 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The applicant, represented by Mr McGuinness of Advice North West, submits that the tribunal has erred in law on the basis that:

   (i) it has not considered all the documents before it;

   (ii) it has not fully addressed the activity of "Engaging with other people";

   (iii) it has failed to consider all the relevant evidence in the activity of "Planning and following a journey".

7. The Department was invited to make observations on the applicant's grounds. Mr Arthurs of Decision Making Services (DMS) responded on behalf of the Department. Mr Arthurs submitted that the tribunal had not materially erred in law. He indicated that the Department did not support the application.

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 previous DLA evidence, a general practitioner's letter, a consultation report from the HCP and a supplementary report. The tribunal also had sight of the applicant's medical records for the past 5 years. The applicant's representative prepared a written submission indicating that the disputed activities were

daily living activity 1 (Preparing food), 3 (Manging therapy), 4 (Washing and bathing), 5 (Manging toilet needs), 6 (Dressing and undressing), 7 (Communicating verbally) and 9 (Engaging with people) and mobility activity 1 (Planning and following journeys). The applicant attended and gave oral evidence. The Department was represented by Mr Conway.

9. The tribunal noted that the applicant complained of difficulties arising from depression, anxiety, back, shoulder and arm pain, and Type 1 diabetes. The tribunal accepted that the applicant's mental health would impede her ability to perform certain daily living activities, awarding points for activities 1, 3, 4, 6 and 9 on this basis. It awarded points for activity 5 on the basis of using incontinence aids. It did not accept that the applicant's physical problems were such as to interfere with daily living, noting the level of treatment and the HCP report. On the applicant's own evidence she had no problem with activity 7. It further disagreed with the Department's assessment that she could be awarded points under activity 10 on the basis of confusion and anxiety related to hypos. On mobility activities, the tribunal accepted on balance that she required prompting in relation to planning and following a journey. It found no relevant restriction on mobilising.

10. Having addressed the issues in the appeal, and accepting that the applicant should be awarded points for daily living activity 1(d), 3(b)(ii), 4(c), 5(b), 6(c)(i) and 9(b), totalling 11 points, and mobility activity 1(b), totalling 4 points, the tribunal maintained the Department's decision.

Relevant legislation

11. 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.

12. 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.

Submissions

13. The applicant, represented by Mr McGuinness of Advice NW, firstly submitted that the tribunal has erred by failing to consider relevant documents. While he acknowledges that the tribunal stated that it had considered all the medical documentation handed in, he submitted that it

had failed to take cognisance of the medical conditions outlined in the medical notes. He further submits that it gave very little weight to the GP notes and letters of 11 October 2018, 20 December 2018 and 18 June 2019 outlining that the applicant suffered from post-traumatic stress disorder (PTSD). He submits that the tribunal erroneously stated that there had been no secondary treatment of mental health issues, despite acknowledging that counselling had taken place in 2018.

14. When elaborating on these grounds, Mr McGuinness submitted that the affected activities were daily living activity 9 (Engaging with other people) and mobility activity 1 (Planning and following a journey). While acknowledging that points had been awarded for descriptor 9.b, Mr McGuinness submitted that evidence supported an award of 9.d(i), referring directly to the applicant's evidence that she required help with social engagement and that she had been referred for cognitive behavioural therapy (CBT) due to anxiety and post-traumatic stress disorder (PTSD).

15. In relation to mobility activity 1, he submitted that the tribunal had placed weight on the circumstance of a fall when running for a bus in Omagh, and had not referred to the explanation that the applicant was accompanied by a friend who had taken her to Omagh to "get away from things". He submitted that the tribunal had unreasonably found the applicant not to be credible.

16. Mr Arthurs for the Department stated that he was unable to comment on the content of the medical records, as he had not seen these. However, on the basis of the evidence including the PIP2 questionnaire and the HCP report he observed that no reference was made by the applicant to PTSD. He submitted that no evidence of limitation arising from PTSD had been placed before the tribunal. He submitted that the tribunal had accepted that the applicant had some issues with depression and anxiety, but found that there was no evidence that these were as significant as she claimed. He observed that the tribunal noted that the applicant had been referred for counselling in 2018, when observing at the same time that she had no psychiatric input.

17. Mr Arthurs referred to the tribunal's statement of reasons as it addressed the issue of negative findings about her taking a bus from Omagh. He submitted that the tribunal had explained its reasoning on the credibility of the applicant's evidence and was entitled to make its findings.

18. As I was also unable to find any evidence referring to PTSD in the file, I directed Mr McGuinness to produce a copy of that evidence. He produced a letter from the applicant's GP dated 18 June 2019 which included the reference relied upon. Following the sharing of this correspondence, Mr Arthurs subsequently accepted that evidence of PTSD was before the tribunal in the letter from the applicant's GP. However, he did not resile from his position that the tribunal had not erred in law.

Assessment

19. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.

20. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

21. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.

22. The applicant submitted firstly that the tribunal had taken little cognisance of evidence relating to PTSD. It would appear that reference to post traumatic stress was first made in a letter dated 18 June 2019, one week prior to the date of hearing. The letter, which post-dated the representative's submission to the tribunal (dated 13 June 2019), did not appear in the tribunal file and was not referred to in the list of "Documents considered" by the tribunal.

23. It is the third in a sequence of letters from the applicant's GP setting out her medical conditions, which began by stating in October 2018 that "she suffers from chronic nervous debility with depression and pathological anxiety", followed by December 2018 stating that "she suffers from ongoing endogenous depression and pathological anxiety with panic attacks" and ending in the June 2019 statement that she "has a long history of depression and anxiety. Over the past year her condition has exacerbated and her medication of fluoxetine has been doubled. She also has been attending a clinical psychologist who has been based in our practice. The deterioration in her mental health has been associated with the deterioration in her physical health with type 1 diabetes and polyarthralgia. She also has been suffering from post-traumatic stress relating to abuse experienced in her past life. She has difficulty dealing with this but has been advised re Nexus".

24. However, the letter dated 18 June 2019 was not referred to in the tribunal's record of proceedings and it did not appear in the copy of the tribunal file that had been provided by the Appeals Service to the Office of the Social Security Commissioner.

25. In these unusual circumstances, I issued a direction requesting the LQM to confirm, to the best of her recollection, whether the letter of 18 June 2019 was before the tribunal. The LQM responded indicating that she had no specific recall of the letter, but had a memory of some medical

evidence relating to diabetes being produced by the representative at a mid-point in the hearing.

26. I find the situation in the present case to be highly unusual. In my experience, when doctor's letter is submitted to the Appeals Service before a hearing, or to the tribunal in the course of a hearing, it is invariably referred to in the record of proceedings or a copy appears on the tribunal file. In this case Mr McGuinness has produced a copy of a doctor's letter dated in the week before the hearing, and submits that it was given to the tribunal at hearing. However, the LQM has no recollection of this and the record of proceedings does not support it. The letter was also not submitted initially with the originating application in the present proceedings, but had to be requested.

27. There is no reason to doubt Mr McGuinness' intention to submit the evidence, which is supportive of the applicant's case and has clearly been obtained for the particular purposes of the tribunal hearing. The circumstances tend to give rise to some doubt in my mind as to whether the letter was actually handed in.

28. On the other hand, the letter introduces a new diagnosed condition of PTSD which is not referred to elsewhere in evidence and, whereas that diagnostic label as such does not augment the evidence of the applicant's functional limitations, it may have affected the tribunal's perception of the credibility of her account.

29. There is a procedure separate from the application for leave to appeal to a Commissioner on grounds of error of law. This is the setting aside procedure under regulation 57 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999. An LQM, where it is just, may set aside a tribunal decision on the basis that a document relating to the proceedings "was not … received at an appropriate time by the person who made the decision". It is possible that had the applicant made such an application to the LQM on the basis of the missing letter, she might have accepted a requirement to set aside the tribunal's decision. At least it was a matter within her discretion.

30. However, Chief Commissioner Martin in *C5/05-06(IB)* held that in certain cases of unfairness, the LQM and the Commissioner can have concurrent jurisdiction. He extended the Commissioner's oversight of the principles of procedural fairness which govern tribunal hearings to include the situation where, through no fault of the tribunal, a document relating to the proceedings was not before it. I followed this approach in *MM v Department for Social Development* [2013] NI Com 71, and observe that Chief Commissioner Mullan has taken the same approach in *DMcT v Department for Social Development* [2015] NI Com 43.

31. In cases where the Appeals Service has received a document and not placed it before a tribunal, the matter is clear cut. Where it is established that a letter has been handed in at hearing, but somehow failed to be

considered, the matter is also clear cut I believe. Where there is doubt as to whether a representative or appellant has actually sent or handed in a document, the position is more problematic. However, the setting aside procedure referred to above is not based on a "no fault" principle, in the sense that any party who fails to hand in a relevant piece of evidence can have the proceedings set aside on request. The failure must be shown to affect the justice of the decision.

32. Here there was a letter prepared in the week before the hearing that introduced a new medical condition which may have influenced the tribunal's view of the appeal. It was not received at an appropriate time by the tribunal in circumstances that are not fully clear. I am narrowly persuaded to find that this was a factor affecting the fairness of the proceedings, albeit through no fault of the tribunal. I reiterate that, as *C5/05-06(IB)* demonstrated, a tribunal does not have to be at fault to err in law in this particular category of procedural fairness. It may not be aware that the missing evidence even exists.

33. I grant leave to appeal on this ground. I will not address the other grounds submitted as this is not necessary for the purposes of deciding the appeal.

34. I find that the tribunal has erred in law in the narrow sense outlines above and I set aside the decision of the appeal tribunal.

35. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

3 March 2021