TM-v-Department for Communities (PIP) [2021] NICom 30

Decision No: C10/21-22(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 10 October 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 EK/1549/19/03/D.

2. For the reasons I give below, I grant leave to appeal. I decide that the tribunal has erred in law and I set aside its decision 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 previously been awarded disability living allowance (DLA) from 24 October 2007. As his award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, he was invited to claim personal independence payment (PIP) from the Department for Communities (the Department). He duly claimed PIP from 13 August 2018 on the basis of needs arising from post-stroke debility, balance and speech problems, nocturia, joint pains and stiffness, depression, anxiety, social withdrawal, hypersensitive retinopathy, chronic renal disease, acid reflux and hypertension.

4. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 13 September 2018. He asked for evidence relating to his previous DLA claim to be considered. The applicant was asked to attend a consultation with a healthcare

professional (HCP) and the Department received an audited report of the consultation on 12 October 2018. On 24 October 2018 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 13 August 2018. The applicant requested a reconsideration of the decision. He was notified that the decision had been reconsidered by the Department but not revised. He 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 on 10 October 2019. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 22 June 2020. 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 18 September 2020. On 21 October 2020 a purported application to a Social Security Commissioner for leave to appeal was received.

6. The application was received after the expiry of the relevant statutory time limit. However, on 3 February 2021 the Chief Social Security Commissioner admitted the late application for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999. The application was subsequently passed to me. I considered that the application was irregular, as the prospective applicant's representative had completed the OSSC1 form in his own name, as if he was the applicant, and had signed his own authority to act for the applicant. The applicant was nowhere named in the application and had not authorised the representative to act. However, it is a requirement under regulation 10 of the Social Security Commissioners (Procedure) Regulations (NI) 1999 (the Commissioners Procedure Regulations) that the application states the name and address of the applicant. The applicant is also required to appoint any representative under regulation 17.

7. On 16 February 2021 the applicant was requested to confirm his personal details and to confirm that he had appointed a representative to act on his behalf. The applicant duly responded on 15 April 2021. In all the circumstances, I waive the irregularity in the proceedings under regulation 27 of the Commissioners Procedure Regulations and I admit the application.

Grounds

8. The applicant, represented by Mr Gibson, submits that the tribunal has erred in law by:

   (i) providing an inadequate record of the proceedings;

   (ii) providing inadequate reasons for its decision.

9. The Department was invited to make observations on the applicant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted that the tribunal had not

materially erred in law. He indicated that the Department did not support the application.

The tribunal's decision

10. 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 a general practitioner (GP) factual report prepared for DLA purposes, the PIP2 questionnaire completed by the applicant, an audited consultation report from the HCP and [what I understand to be] an unaudited version of the HCP report, along with elements from the applicant's GP records. The applicant attended the hearing and gave oral evidence, accompanied by his wife and represented by Mr Gibson. The Department was represented by Ms Herron.

11. The panel considered that the applicant should be awarded 5 points for daily living activities 1.d (prompting to prepare a meal), 3.b(ii) (supervision to manage medication), and 9.b (prompting to be able to engage with other people). It found on the basis of the applicant's evidence that he did not require help taking nutrition, managing toilet needs and making budgeting decisions. It did not accept his evidence to the effect that he required supervision while showering, help dressing and undressing, communicating verbally or understanding signs symbols and words. It made reference to his ability to drive a car as a factor going to credibility in relation to the latter activities.

12. The panel considered that the applicant should be awarded 4 points for mobility activity 2.b, declining to accept his evidence of a walking distance restriction of 10 metres. On the basis of the evidence as a whole, it accepted that he would be restricted to walking a distance of between 50-200 metres. It declined to accept that he required assistance planning and following journeys, again on the basis that the applicant was able to drive a car. As this led to an award of 5 points for daily living and 4 points for mobility, each below the relevant threshold of 8 points, it disallowed the appeal.

Relevant legislation

13. 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.

14. 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.

15. 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.

Submissions

16. Mr Gibson, on behalf of the applicant, submitted that the tribunal has given an inadequate record of proceedings, noting that it had not recorded the time of the beginning and end of the hearing. He submitted that it had failed to record and address crucial evidence from the appellant's spouse, including her evidence that it had been 10 years since the appellant drove.

17. He submitted that the statement of reasons was inadequate because the tribunal had failed to address the previous award of high rate mobility component of DLA. He submitted that it had based findings that the applicant could get in and out of a motor car without difficulty on no evidence, failed to address his propensity to fall and failed to address entries in the medical records that were supportive of the applicant's case.

18. He submitted that the delay in preparing the statement of reasons of over 7 months was unreasonable and breached the requirements of Article 6 of the European Convention on Human Rights.

19. For the Department, Mr Killeen submitted that it was preferable to record the start and end time of a hearing, but that it was not an error of law to fail to do so. He submitted that the tribunal had adequately recorded the submission regarding driving. He submitted that the tribunal was not obliged to address the reasons for departing from the previous DLA mobility award unless obvious inconsistency arose with it. He submitted that the tribunal had referred to the applicant's GP records in general and was not obliged to address each piece of evidence before it. He also submitted that it was not required to enter into detailed reasoning as to why it believed or disbelieved evidence.

Assessment

20. 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.

21. 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.

22. 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.

23. The applicant, though Mr Gibson, submits that the tribunal's record of proceedings is inadequate. He submits that it failed in particular to record the start time and the end time of the proceedings and that it failed to

record crucial evidence from the applicant's spouse including, but not limited to, that it had been about 10 years since the applicant drove.

24. I observe that the tribunal pro forma record sheet includes a space to enter "Start time:" and "End Time:" and that, as submitted by Mr Gibson, these spaces were left blank. There is a statutory requirement on tribunals under regulation 55(1) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 to make a record of proceedings as follows:

> "A record of the proceedings at an oral hearing, which is sufficient to indicate the evidence taken, shall be made by the chairman or, in the case of an appeal tribunal which has only one member, by that member, in such medium as he may determine".

25. It is not obvious to me why the pro forma document used for recording proceedings has a space to enter a start time and an end time. One purpose might be to assist those administering tribunals to record and determine the average duration of hearings. However, I do not believe that it has a function under the statutory framework. The duty on the tribunal is to indicate the evidence taken. The start time and end time are not part of the evidence. I do not consider that a tribunal arguably errs in law by failing to record the start time and end time.

26. As an example of the inadequacy of the record of proceedings, Mr Gibson submitted that it had failed to record evidence from the applicant's spouse that it had been about 10 years since the applicant drove. However, in the eighth paragraph of the record of proceedings, the tribunal has recorded:

> "His wife indicated that his memory was not good, it was about 10 years since he last drove but he is insured to drive the 3 cars. He has not driven for about one year after the stroke …"

27. I do not, therefore, consider that the applicant has demonstrated an arguable case on his first ground.

28. Mr Gibson submits that the tribunal has given inadequate reasons for its decision and has failed to address evidence and submissions. Firstly, he submits that the applicant was previously awarded high rate mobility component of DLA and that the tribunal failed to deal adequately with that matter. For the Department, Mr Killeen has referred to *RF v Department for Communities* [2019] NI Com 72 and *NE v Department for Communities* [2020] NI Com 45. In the latter case at paragraphs 16-17, I had said:

> "16. I will deal with the appellant's second ground first, as it is a generic ground which has been considered in other applications on previous occasions. I will grant leave to appeal on this ground. However, for

> the reasons stated most recently in *JF-v-Department for Communities* [2019] NI Com 72 and *LMcC v Department for Communities* [2020] NI Com 19, I reject this ground. In those cases, I held that there was no automatic requirement on a tribunal to explain a refusal of PIP mobility component in the context of an appellant who held a previous DLA high rate mobility award, unless the case involved some obvious inconsistency that required particular elucidation. The simple fact of the matter is that the rules of entitlement for DLA mobility component and PIP mobility component are different, following a political decision to change them.
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> 17. In the circumstances of this case, the tribunal accepted that the appellant can stand and then move more than 50 metres but no more than 200 metres either aided or unaided, awarding points for mobility activity 2(b). I do not consider that this assessment is inconsistent with the previous award of DLA high rate mobility component, or that the tribunal required to explain itself in any greater detail than it did. It is self-evident from the conditions of entitlement to PIP that many claimants previously awarded DLA may not retain their entitlement."

29. The tribunal in the present case also awarded 4 points for mobility activity 2(b), corresponding with an assessment that the applicant could stand and then move between 50-200 metres either aided or unaided. I do not consider that assessment, which does not lead to an award in the context of PIP, to be inconsistent with the applicant's previous award of high rate mobility component of DLA. I refuse leave on this ground.

30. Mr Gibson submits further that the tribunal did not base its decision on the available evidence and had made findings based on insufficient evidence. As an example he referred to the tribunal's finding that "the applicant could get in and out of a motor vehicle without difficulty". More generally, he submitted, the tribunal had failed to address entries in the medical records, particularly with regard to balance and speech. These had been furnished to the tribunal in response to the direction of an earlier LQM in the course of the proceedings.

31. The issue of driving takes us to the heart of the matter. In oral evidence to the tribunal, the applicant stated that he had a current driving licence, and was insured to drive his daughter's car, his brother's car and his wife's car. He said that he last drove about a year ago, driving two miles into the local town. This was different to what he had said to the HCP. Specifically, he told the HCP that he had not driven since his stroke in 2005, due to lack of confidence and lack of concentration. These two statements are not

necessarily inconsistent, as the tribunal hearing took place on 10 October 2019 and the HCP examination on 4 October 2018. Therefore, he could have driven just after the HCP examination and both statements would be accurate. However, the applicant's wife had also given evidence that he had not driven for 10 years. She had also indicated that he was insured to drive three cars and that his driving licence had been renewed in 2015. The applicant had been a rally driver in the past.

32. The tribunal plainly preferred the evidence of the applicant that he had driven a car relatively recently, over that of his wife, who denied that he drove. It was evidently influenced by the fact that the applicant's driving licence had been renewed in 2015 and that the applicant was insured to drive no fewer than three cars. The tribunal generally found that the applicant exaggerated his limitations. It made particular reference to driving to rationalise its findings in relation to activity 5 (Managing toilet needs), activity 6 (Dressing) – saying that he could manage toilet needs without difficulty if he could get in and out of a car, and that he could stand to dress as if he had unsteadiness he would not be able to drive a motor vehicle.

33. Mr Gibson pointed generally to medical evidence in the medical records indicating unsteadiness and anxiety going out. He submitted that the tribunal had not dealt with that evidence adequately.

34. I have previously pointed out the difficulties that can arise when tribunals extrapolate a variety of findings from evidence about driving. In particular, in *JMcD-v-Department for Communities* (PIP) [2019] NI Com 4, I made the following observations:

> "18. The applicant secondly submits that the tribunal erred in addressing the ability of the applicant to perform certain daily activities in the light of his ability to drive a car up to 4 May 2017. He submits that this indicates that the tribunal gave weight to an immaterial matter. I disagree. The ability of a claimant to perform one type of daily activity which is not within the scheduled activities can be helpful in determining whether he or she has the ability to perform certain other activities which are.
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> 19. Ability to drive a car is dependent on certain functional and cognitive abilities. Among other things, it requires the ability to open the door and enter and exit the vehicle; to sit without changing position for a period of time; to use the hands to grip and turn the controls and to make nuanced arm movements to steer; to use the feet on pedals to accelerate and brake, and to use the clutch in a manual car; to move the upper body and neck flexibly to look around; to be able to plan a journey

and respond to unpredictable circumstances and road conditions; and to have adequate vision and reactions to drive safely.

20. The ability to drive a car is not consistent with a high level of dependency on others with the activities of daily living. It is legitimate for a tribunal to consider how the actions involved in driving a car may read across into the scheduled daily living and mobility activities. Nevertheless, that general principle is subject to the qualification that the activity in question is genuinely comparable and that it is done with the same level or regularity as the scheduled activity. The ability to perform daily living activities has to be addressed within the context of regulation 4 and regulation 7 of the PIP Regulations. The implication is that occasional driving may not be an appropriate comparator. It is certainly arguable that, unless the tribunal determines whether a claimant could drive on over 50% of the days in the required period, it has not properly addressed regulation 7, for example."

35. The tribunal made certain findings of fact on the basis of its belief that the applicant could drive a car. The applicant had stated that he had last driven one year previously. His wife denied that he drove at all since 2005, consistent with what the applicant had said to the HCP. The tribunal found it strange that the applicant would be insured to drive three cars at a date some 14 years after his wife submitted that he last drove. For that matter, it might reasonably have asked why the applicant renewed his driving licence in 2015 if he could no longer drive. In any event, the tribunal inferred from the circumstances that the applicant did drive. However, there are difficulties when making findings based on circumstantial evidence in a context of conflicting testimony. It is a very different situation to that of an appellant freely offering direct evidence of driving. In particular, it is difficult for a tribunal to assess how often an appellant might drive and in what manner or with what assistance.

36. In his oral evidence, the applicant said that he had last driven a year ago. However, the tribunal has not made a finding on how often the applicant actually drove. One instance of driving in the past 12 months does not necessarily indicate an ability to perform daily living or mobility activities in the manner and with the regularity envisaged by regulation 4 or for 50% of the time as required by regulation 7. As one representative memorably submitted to me, when occasional driving was argued as evidence that the appellant could prepare a main meal for DLA purposes, "she does not have to drive every day but she does have to eat every day".

37. Furthermore, the tribunal - having found that the applicant could drive - has inferred from this the ability to get in and out of the car without difficulty,

and an absence of unsteadiness, using these as the basis for deciding activities 5 and 6. Although it extrapolated its finding that the applicant drove a car into the activities of managing toilet needs and dressing, it seems to me that the tribunal had no basis in evidence for finding how the applicant might have got into the car or how safely he might drive despite unsteadiness.

38. I appreciate that the tribunal lacked trust in the credibility of the applicant and his wife and therefore doubted their evidence generally. The issue of driving served as a basis for rejecting that evidence. However, as Mr Gibson points out, the medical records – which an LQM at an earlier stage in the proceedings had directed the applicant to produce – made many references to unsteadiness and physical problems. The tribunal simply did not deal with that evidence when it stated that it "did not believe that unsteadiness was a big issue for him as if there was a difficulty with this he would not be driving a motor vehicle".

39. It appears to me that the applicant established an arguable case that the tribunal has erred in law.

40. A tribunal is entitled to make its own determination of an appellant's credibility, particularly since it has had the opportunity to hear his evidence and observe his demeanour. It is not required to give particularly detailed reasons for its assessment of credibility. In the particular case, the tribunal was plainly entitled to find that the applicant drove a motor vehicle, particularly since he told it that he had done so in the previous 12 months, despite his wife's evidence to the contrary, noting his driving licence renewal and the fact of him being insured to drive three vehicles.

41. However, in the absence of evidence, it seems to me that the tribunal was not entitled to make assumptions about how regularly the applicant might drive, whether he could access the driving seat of the vehicle without difficulty, or to conclude that he was able to drive because he was not unsteady on his feet, when he might just as easily have driven despite being unsteady on his feet. Indeed, the medical evidence of unsteadiness would appear to make the latter the most likely scenario. Despite the tribunal's general rejection of the credibility of the applicant, it was still required to make findings based on evidence.

42. I accept the submission of Mr Gibson that the tribunal has made certain findings that are unsupported by evidence and that it has not addressed aspects of the evidence arising from the applicant's medical records. I find that the tribunal has erred in law and I set aside its decision under Article 15(8)(b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

30 June 2021