SMcG-v-Department for Communities (PIP) [2022] NICom 21

Decision No: C35/21-22(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 24 March 2021

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from the decision of an appeal tribunal with reference CR/2789/20/02/D.

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

REASONS

Background

3. The appellant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 10 February 2020 on the basis of needs arising from sciatica, high cholesterol, depression, snapped cartilage right knee and arthritis. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 23 March 2020. The appellant was asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 11 May 2020. On 25 June 2020, the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 10 February 2020. The appellant requested a reconsideration of the decision. He was notified that the decision had been reconsidered by the Department but not revised. He appealed and accepted an oral hearing of the appeal by way of a live telephone link.

4. The appeal was considered at an oral telephone hearing on 24 March 2021 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision, and this was issued on 22 September 2021.

5. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal and leave to appeal was granted by a determination of the salaried LQM issued on 25 January 2022. The question of law on which she granted leave was whether the tribunal was correct in its assessment of safety under regulation 4 of the IP Regulations, where it stated that dressing/undressing did not involve the safety of the applicant to the same degree as washing and toileting. On 23 February 2022, the appellant lodged his appeal with the Office of the Social Security Commissioners.

Grounds

6. The appellant, represented by Ms Rothwell of Law Centre NI, submitted that the tribunal had erred in law by:

   (i) making irrational findings in relation to dressing/undressing;

   (ii) using the wrong legal test in relation to engaging with others;

   (iii) failing to give sufficient weight to evidence concerning fibromyalgia symptoms.

7. The Department was invited to make observations on the appellant's grounds. Ms Patterson of Decision Making Services (DMS) responded on behalf of the Department. Ms Patterson did not accept that the tribunal had materially erred in law. She indicated that the Department did not support the appeal.

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 and a consultation report from the HCP, a submission from the appellant's representative and medical evidence provided by the appellant, which included a print out from his general practitioner (GP) records including consultants' letters. The appellant participated in the hearing and gave oral evidence by way of a live telephone link.

9. The tribunal noted the relevant medical conditions as sciatica, high cholesterol, depression, and arthritis. An injury in the right knee was noted as occurring after the date of decision under appeal and was therefore

outside the scope of the panel's consideration. The medical notes and records further contained a diagnosis of stable angina and high blood pressure. While the GP records referred to a possible diagnosis of fibromyalgia, the panel observed that the main elements of fibromyalgia – namely fatigue and muscle pain – did not appear to have been present.

10. The panel addressed each of the daily living activities. It accepted that he might require to use an aid to shower and to dress/undress, awarding 2 points each for descriptors 4.b and 5.b, but did not accept that he would have relevant restrictions otherwise. In relation to mobility, it accepted that he was restricted to walking between 50 and 200 metres, awarding four points for descriptor 2.b. As he did not reach the relevant threshold of eight points for either component, the tribunal disallowed his appeal.

Relevant legislation

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.

11. 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.

12. 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.

Hearing

13. I held an oral hearing of the appeal. Ms Rothwell of Law Centre NI appeared for the appellant. Ms Patterson of DMS appeared for the Department. I am grateful to them for their submissions. At the outset I observed that leave had been granted on the issue of aspects of the grounds relating to safety. Ms Rothwell indicated that she wished to pursue all of her grounds of application for leave, in addition to the ground on which leave was granted by the LQM.

14. Ms Rothwell submitted that the tribunal had made inconsistent findings in relation to needs with dressing/undressing, as opposed to the findings on washing/bathing and managing toilet needs. She submitted that the aspects of functional limitation accepted by the tribunal regarding washing and managing toilet needs were present in relation to the similar activity of dressing. The tribunal had referred to intermittent back problems, which affected all activities.

15. Ms Patterson submitted that the activities engaged in the present appeal were all distinct from each other. She relied on the decision of Great Britain Upper Tribunal Judge May in *AK v Secretary of State for Work and Pensions* [2016] UKUT 256 AAC, to the effect that activities 5 and 6 are

separate and distinct. She submitted that different issues arose in a potentially wet environment, where safety concerns might arise from slipping hazards. She sought to distinguish the physical movements involved in the different activities. She also observed that at the date in issue in this appeal, the appellant was still working as a carpet fitter.

16. Ms Rothwell submitted that the tribunal placed weight on the appellant's ability to meet friends and family but had not addressed his difficulties with going out of the house. She further submitted that the tribunal had not taken adequate notice of the appellant's diagnosis of fibromyalgia. She submitted that the applicant's symptoms of fatigue and joint pain, which the GP notes referred to, had been overlooked by the tribunal, which stated that "nowhere … did the GP refer to the main elements of fibromyalgia – that of fatigue and multiple joint pain…". However, Ms Rothwell demonstrated that the GP notes in March 2020 did indeed refer to "all over joint pains", saying "suspect arthritic/fibromyalgia/low mood, start fluoxetine, refer rheumatology". She submitted that the tribunal failed to give any weight to that evidence.

17. Ms Patterson did accept that the tribunal had considered an unduly narrow range of social relationships and could have developed its reasoning further. However, she submitted that the appellant's expressed difficulties would not amount to a scoring descriptor in any event. She submitted that while depression was present, there was no evidence of anxiety. She submitted that, as he worked laying carpet in people's houses, he would regularly engage with other people.

18. Ms Patterson noted that a GP letter referring to fibromyalgia was before the tribunal, albeit that it post-dated the decision. She contended that this material, in addition to the GP entry in the medical records, suggested that the tribunal had not addressed fibromyalgia and had potentially erred in relation to material fact. However, she submitted that the reference to joint pains and fatigue did not indicate how this would limit ability to perform the scheduled activities and submitted that it was not a material error.

19. Ms Rothwell addressed the issue that the appellant appeared to have been working as a carpet fitter at or close to the decision. She submitted that economic necessity made him tolerate levels of pain in order to continue working and that the fact of his employment was not an appropriate reflection of his ability to perform the scheduled activities without pain.

20. Ms Rothwell further sought to argue a point raised in correspondence after the date of the appeal. This was a new ground and technically out of time. Her submission was that the tribunal had erred by referring to the appellant's own evidence of a walking limitation of 50 yards (some 45 metres) only, in the absence of HCP evidence on this question, when finding that he could walk more than 50 metres. Ms Patterson was given further time to respond. She observed that the HCP report contained a record of the appellant's own statement to the effect that he could walk 200-400 metres without an aid and without stopping.

Assessment

21. The parties inform me that an award of standard rate daily living component and enhanced rate mobility component was made to the appellant by the Department from 8 April 2021 to 6 July 2024. This award has the effect that my jurisdiction is confined to the period from 10 February 2020 to 7 April 2021. The fact of a subsequent award does not affect my approach to the issues in the appeal, which addresses how the appellant was at the date of the original decision to disallow him.

22. I accept that there is apparent inconsistency between the tribunal's findings on dressing and washing and managing toilet needs. An issue that was relied upon as distinguishing those sets of activities was whether the wet environment involved in washing/bathing was different from the environment in dressing/undressing. I fully accept that activities such as showering and bathing will generate a slippery floor, with inherent risks arising. However, it was more difficult to understand the distinction made in relation to managing toilet needs. The tribunal accepted a need for an aid in rising, on the basis that low back pain would limit the ability to rise from a toilet. A question that I posed to the parties was whether the risk of back pain on bending to put on shoes or socks was distinct from the risk of pain on bending forward to rise from a toilet. Ms Patterson submitted that the low height of the toilet and specific difficulty rising was a factor in the tribunal accepting that activity.

23. I understood that the tribunal accepted that an aid such as a handrail or raised toilet seat might be required by the appellant at times when his back condition was painful. However, I do not understand, if the tribunal accepted intermittent limitations in rising from a toilet due to back pain, why it did not accept intermittent limitations in putting on shoes and socks that might have given rise to a need for a relevant aid. The tribunal rationalised the different approach in relation to washing and bathing by reference to safety needs in a wet environment. However, I fail to understand how such a distinction would justify a different approach between managing toilet needs and dressing/undressing. I accept that there is merit in this ground of appeal on the basis the tribunal's reasons are either inadequate to explain its decision, or that there is inconsistency – and therefore irrationality – in the tribunal's findings. However, this would only bring two further points into contention, and this would not be material in the sense that it would lead to a different outcome.

24. Ms Rothwell had submitted that the tribunal's approach to activity 9 was erroneous. She submitted that the tribunal appeared to determine that, because the appellant had no difficulty engaging with family and friends, and people that did not annoy him, he met no scoring descriptors. She submitted that it was well established that a tribunal must consider a claimant's ability to engage with other people and not just those they know well (relying on *HA v SSWP* [2018] UKUT 56). Ms Patterson accepted that it was the appellant's ability to meet and engage with others in a social

context that is to be tested. However, she pointed out that his job would involve working in people's homes and submitted that, apart from identifying an issue of annoyance with jostling crowds, there was no evidence of difficulty engaging with others. She submitted, that in its formulation "people who did not annoy him", the tribunal had expressly widened its consideration beyond family and friends. Nevertheless, she did express some concern that the tribunal could have investigated the position more thoroughly.

25. It does appear to me that there is some force in Ms Rothwell's submissions. The tribunal does appear to have based its findings of the appellant's engagement with family and friends. While it referred to "people that do not annoy him", this was a reference to an issue that the appellant raised about anger when jostled in crowded places. It did not refer to social engagement generally. While the decision under appeal was made during the Covid-19 lockdown, and therefore when he presumably was not working, the tribunal did not directly engage with the duties in the appellant's job as a carpet fitter, and whether this involved social engagement in the sense of the relevant descriptors. However, there appeared to be difficulties in this environment. At the tribunal hearing the appellant gave evidence of a post-decision change of employment into a security job, where he did not have to engage "in long conversations with people" and could "put his head down" if someone annoyed him when he was working. I accept that the tribunal has not made full findings relevant to this activity.

26. A further issue raised was that of the tribunal's investigation of the symptoms of fibromyalgia. The tribunal stated expressly that "nowhere in the GP notes and records did the GP refer to the main elements of fibromyalgia – that of fatigue and multiple joint pain". Ms Rothwell submitted that this was a mistake of fact. She referred me to the GP notes and records that were before the tribunal, and I accept that these – for example the entry of 13 March 2020 read "all over joint pains, feeling tired run down" – made reference to fatigue and multiple joint pain. The tribunal did not then question the appellant about this aspect directly and stated that he himself did not refer to it being a difficulty. Ms Patterson correctly pointed out that it is not the medical condition itself, but the restrictions caused by it, that can lead to an award of points. However, the tribunal did not address specific questions to the appellant about the effects of this particular condition on him. The medical evidence supported the presence of the condition. In consequence, the tribunal was required to ask the appellant how it affected him. In its own words the tribunal states that it "although not ignoring it as a condition suffered by the appellant did not question directly about it". I consider that this was an error of law.

27. Ms Rothwell sought to raise a further ground that had been advanced in correspondence after the receipt of the appeal. I pointed out that this was a ground of application that was made out of time. I gave the parties further time to make submissions on the issue, without a determination as to whether I would admit the late ground. In the event, I consider that I do

not need to address this issue. On the grounds advanced by Ms Rothwell, I allow the appeal.

Disposal

28. Each of the parties accepted that, if I were to allow the appeal, the appropriate course was to remit to a newly constituted tribunal for determination. I adopt that course. I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination, under Article 15(8)(b) of the Social Security (NI) Order 1998.

(signed): O Stockman

Commissioner

3 October 2022