PT-v-Department for Communities (PIP) [2022] NICom 28

Decision No: C12/22-23(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 21 August 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 20 August 2019 is in error of law. The error of law identified will be explained in more detail below.

2. 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.

3. I am able to exercise the power conferred on me by Article 15(8)(a)(ii) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so after making a fresh finding of fact.

4. My revised decision is that the appellant is entitled to the standard rate of the daily living component of Personal Independence Payment (PIP) from 21 March 2018 to 28 October 2021. I address the duration of the award below.

Background

5. On 14 February 2018 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 27 November 2017. Following a request to that effect, the decision dated 14 February 2018 was reconsidered on 11 April 2018 but was not changed. An appeal against the decision dated 14 February 2018 was received in the Department on 8 May 2018.

6. Following two earlier postponements, the appeal tribunal hearing took place on 20 August 2019. The appellant was present, was accompanied by her daughter and was represented by Ms McKeith. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 14 February 2018. The appeal tribunal did apply descriptors from Parts 2 and 3 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations') which the decision maker had not applied. The score for these descriptors were insufficient for an award of entitlement to the daily living component and mobility components of PIP at the standard rate – see article 83 of the Welfare Reform (Northern Ireland) Order 2015 and regulation 5 of the 2016 Regulations.

7. On 4 March 2020 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service. On 16 March 2020, the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 30 July 2020 a further application for leave to appeal was received in the office of the Social Security Commissioners. The appellant was represented in this application by Mr Black of the Law Centre NI.

9. On 19 August 2020 observations on the application were requested from Decision Making Services (DMS). In written observations dated 16 September 2020, Mr Killeen, for DMS, supported the application on both of the grounds advanced by Mr Black but submitted that one of identified grounds did not identify a material error of law. The written submissions were shared with the appellant and Mr Black on 17 September 2020. On 5 October 2020, a brief submission in response was received from Mr Black.

10. From June 2020 and into 2021 priority had to be given to a large group of cases in the office of the Social Security Commissioners. This has led to a delay in the promulgation of this decision for which apologies are extended to the appellant, Mr Black and Mr Killeen.

11. On 2 June 2021 I granted leave to appeal and determined that an oral hearing of the appeal would not be required. The late application was accepted for special reasons on 23 June 2021.

Errors of law

12. 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?

13. 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');
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> (ii) failing to give reasons or any adequate reasons for findings on material matters;
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> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
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> (iv) giving weight to immaterial matters;
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> (v) making a material misdirection of law on any material matter;
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> (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."

Analysis

14. Mr Black identified two grounds of appeal. He set out the first as follows:

> '**1. It is submitted that the tribunal has erred in law by making irrational findings and/or failing to give adequate reasons for findings on material matters, specifically in the award of points under Daily Living descriptor 1.**
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> The tribunal has awarded 2 points under activity descriptor 1 (b) 'Needs to use an aid or appliance to be able to either prepare or cook a simple meal.' In justifying this the tribunal noted:
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> *We do not accept the Appellant's evidence that* she *has set the house on fire 3 times nor she is never hungry and misses meals but yet her weight has gone up! We think A cooks and freezes meals for her and she can microwave these with a bit of prompting.*

This is an insufficient explanation and potentially erroneous reasoning for the award of 2 points under descriptor 1 (b). Firstly, **AI v SSWP (PIP) [2016] UKUT 0322 (AAC)** determined that a microwave is not an 'aid or appliance' for cooking / Definition of 'simple meal' under Activity 1. In **AI** Judge Mesher states:

> *"I agree with Judge Gray in paragraph 23 of LC v Secretary of State for Work and Pensions (PIP) [2016] UKUT 150 (AAC) where she says that the mention of microwave cooking in daily living descriptor 1(c) does not mean the heating of ready prepared microwave meals."*

(Judge) Mesher goes on to say:

> *"It is my provisional view that the tribunal of 3 September 2015 went also wrong in law in relying on daily living activity 1(b), because a microwave is not an aid or appliance. "Aid or appliance" is defined in regulation 2 of the PIP Regulations to mean "any device which improves, provides or replaces [the claimant's] impaired physical or mental functionn. I cannot see that using a microwave to cook, or a conventional cooker for that matter, does any of those things. It merely provides one means of cooking."*

Given the 2 points awarded would have been the same if the Tribunal had made an award under Activity 1 (c) and the noted need for prompting for the Appellant to prepare a meal, this error by the tribunal may not by itself be seen as material.

However, we would also note the decision in **LC v SSWP (PIP) [2016] UKUT 0150(AAC)** where Judge Gray states at paragraph 23:

> *"23. "The mention of microwave cooking in descriptor 1 c does not mean the heating of ready prepared microwave meals. It is still necessary for the claimant to be able to prepare and cook the food from fresh ingredients, the definition in the Schedule of a 'simple meal' being 'a cooked one-course meal for one using fresh ingredients'."*

The Tribunal's reasons for decision seem to suggest that because the Appellant can heat a prepared meal in the microwave, that this constitutes being able to prepare and cook a simple meal using a microwave. However, the decision in **LC** noted above clearly sets out that use of microwave to heat ready prepared food is not sufficient to be considered being able to prepare and cook a simple meal. Given a change in determination under activity 1 could lead to the award of additional points under descriptors (e) or (f), we submit that this is a material error of law.'

15. Mr Killeen responded to this initial ground of appeal as follows:

'Mr Black contends the Tribunal erred determining descriptor 1b (2 points - *Needs to use an aid or appliance to be able to either prepare or cook a simple meal*) applied for (the appellant's) use of a microwave. He notes that previous case law indicates that a microwave is not an aid or appliance and that using one to heat a prepared meal would not satisfy descriptor 1c (2 points - *Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave*) either. Mr Black submits that a possible finding of descriptor 1e (4 points - *Needs supervision or assistance to either prepare or cook a simple meal*) or descriptor 1f (8 points - *Cannot prepare and cook food*) would amount to a material error. Mr Black cites *AI v SSWP (PIP) [2016] UKUT 322 (AAC) and LC v SSWP (PIP) [2016] UKUT 0150 (AAC).*

I agree with the contention of Mr Black that the tribunal's reasoning for descriptor 1b (*Needs to use an aid or appliance to be able to either prepare or cook a simple meal*) is irrational and/or inadequate and agree with his reasons for that conclusion. I also agree with the contention that 1c (*Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave*) would not be appropriate as the tribunal's findings indicate that they believe she reheats frozen meals rather than making a simple meal from fresh ingredients with the use of a microwave.

I do not think that this error amounts to a material error. In her PIP2 application form (Tab 4 in the Department's submission), (the appellant) indicated she did not use an aid or appliance to prepare or cook a simple meal but that she did need help from another person. (The appellant) stated that she is forgetful and would leave things unattended, that she has difficulty lifting heavy things and that she needs encouraged to do anything and would not

cook for herself, stating her daughters mostly cook for her. In the Disability Assessor's report (Tab 5 in the Department's submission) it is recorded that her daughters prepare and cook her meals, she uses a microwave to heat them up and that she forgot to turn off the cooker 3 times before and now feels unsafe cooking.

I note the following excerpts the record of proceedings;

> *"The Appellant told us that at the date of the decision 14.2.18 her mental health was impacting everything. She said that she did not want to go out or do anything. She said that stayed in bed unless someone came in… She only got out of bed for a drink. She wouldn't open the door unless she knew who it was…*
>
> *Preparing Food:*
>
> *The Appellant told us that she has set the house on fire 3 times. However, she could only remember the details of the one occasion and could not remember when it was. She told us that she had potatoes on and forgot about them and went upstairs and was alerted by the dog barking. She said the incident frightened her. She had no timer in the kitchen. She said that she never feels hungry, but her weight has gone up even though she misses meals. She makes meals, freezes them and microwaves them if she feels hungry but she never does."*

I note the following excerpt from the statement of reasons;

> *"a) Preparing food:*
>
> *We do not accept the Appellant's evidence that she set the house on fire 3 times nor that she is never hungry and misses meals but yet her weight has gone up! We think A cooks and freezes meals for her and she can microwave these with a bit of prompting."*

I submit that the evidence before the Tribunal does not suggest this level of restriction for either descriptor. As the tribunal did not accept that (the appellant) has previously caused 3 fires, there was little justification for 1e. The restrictions outlined by (the appellant) do not suggest she

cannot prepare or simple meal. Having viewed the available evidence, it would seem descriptor 1d (2 points - *Needs prompting to be able to either prepare or cook a simple meal*) may be a more appropriate descriptor. However, descriptor 1d is also only worth 2 points and therefore would not result in an award of benefit for (the appellant).

I therefore submit that the Tribunal has not erred materially on this ground.'

16. I begin by adopting and accepting the reasoning and analysis of Upper Tribunal Judge Gray in *LC* and Upper Tribunal Judge Mesher in *AI*, which, in my view, properly reflect the law in Northern Ireland. For the reasons which have been set out in detail by Mr Black and Mr Killeen I agree that the appeal tribunal has erred in law in the manner in which it has approached the potential descriptors in activity 1 in Part 2 of the Schedule to the Personal Independence Payment Regulations (Northern Ireland) 2016, as amended ('the 2016 Regulations').

17. Is the error a material error? As noted above, Mr Killeen submits that it is not on the basis that, in his view, and based on an assessment of the evidence which was before the appeal tribunal, that the only other potential descriptor which the appeal tribunal could have applied was descriptor 1d and, as this attracted the same score as the already awarded descriptor 1b, (2) would not have advanced the appellant's case towards benefit entitlement.

18. I see no reason to criticise the appeal tribunal's conclusions that it did not accept the appellant's evidence about setting the house on fire. As I have noted many times, in *C14/02-03(DLA)*, Commissioner Brown, at paragraph 11, stated:

   ' … there is no universal rule that a Tribunal must always explain its assessment of credibility. It will usually be enough for a Tribunal to say that it does not believe a witness.'

19. Additionally, in *R3-01(IB)(T)*, a Tribunal of Commissioners, at paragraph 22 repeated what the duty is:

   'We do not consider that there is any universal obligation on a Tribunal to explain its assessment of credibility. We disagree with *CSIB/459/*97 in that respect. There may of course be occasions when this is necessary, but it is not an absolute rule that this must always be done. If a Tribunal makes clear that it does not believe a claimant's evidence or that it considers him to be exaggerating this will usually be sufficient. The Tribunal is not required to give reasons for its reasons. There may be situations

> when a further explanation will be required but the only standard is that the reasons should explain the decision. It will, however, normally be a sufficient explanation for rejecting an item of evidence, including evidence of a party to an appeal, to say that the witness is not believed or is exaggerating.'

20. This reasoning was confirmed in *CIS/4022/2007*. After analysing a series of authorities on the issue of the assessment of credibility, including *R3-01(IB)(T)*, the Deputy Commissioner (as he then was) summarised, at paragraph 52, as follows:

> 'In my assessment the fundamental principles to be derived from these cases and to be applied by tribunals where credibility is in issue may be summarised as follows: (1) there is no formal requirement that a claimant's evidence be corroborated – but, although it is not a prerequisite, corroborative evidence may well reinforce the claimant's evidence; (2) equally, there is no obligation on a tribunal simply to accept a claimant's evidence as credible; (3) the decision on credibility is a decision for the tribunal in the exercise of its judgment, weighing and taking into account all relevant considerations (e.g. the person's reliability, the internal consistency of their account, its consistency with other evidence, its inherent plausibility, etc, whilst bearing in mind that the bare-faced liar may appear wholly consistent and the truthful witness's account may have gaps and discrepancies, not least due to forgetfulness or mental health problems); (4) subject to the requirements of natural justice, there is no obligation on a tribunal to put a finding as to credibility to a party for comment before reaching a decision; (5) having arrived at its decision, there is no universal obligation on tribunals to explain assessments of credibility in every instance; (6) there is, however, an obligation on a tribunal to give adequate reasons for its decision, which may, depending on the circumstances, include a brief explanation as to why a particular piece of evidence has not been accepted. As the Northern Ireland Tribunal of Commissioners explained in R 3/01(IB)(T), ultimately "the only rule is that the reasons for the decision must make the decision comprehensible to a reasonable person reading it".

21. The appeal tribunal's conclusions with respect to the appellant's ability to prepare food is summed up in the statement that the appellant's daughter 'cooks and freezes meals for her and she can microwave these with a bit of prompting.' The two remaining descriptors which could have applied and made a difference were 1e 'Needs supervision or assistance to either prepare or cook a simple meal' and 1f 'Cannot prepare and cook food.' It is my view that having approached activity with a complete

misunderstanding of the role played by a microwave in preparing food, for the purposes of activity 1, the appeal tribunal failed to properly to assess the potential application of the additional descriptors in activity 1, including the higher scoring descriptors 1e and 1f. With such a proper assessment, it could have been possible, and I put it no more highly than that, that descriptor 1f might have been applicable.

22. If I am wrong about that. I turn to the second ground of appeal which Mr Black set out as follows:

> **'2. It is submitted that the tribunal has erred in law by making irrational findings and/or failing to give adequate reasons for findings on material matters, specifically in the award of points under Daily Living descriptor 6.**
>
> The Tribunal awarded the claimant 7 points overall in the Daily Living Activities of PIP. 2 of these points appear to be awarded, at least partly, for the necessity of prompting to prepare food. Another 2 points were awarded for the necessity of prompting to engage with other people. A further 2 points were awarded for the necessity of prompting in order to wash or bathe. We therefore question why a further 2 points were not awarded for the requirement of prompting in order to dress/undress.
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> When considering the application of Daily Living descriptor 6 'Dressing' to the Appellant the Tribunal note:
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> • *"In the PIP2 and to the Disability Assessor the Appellant said she needed prompting with this.*
>
> • *However in her oral evidence she indicated that while she can physically do it and does not need assistance or supervision, she prefers to stay in her pyjamas and she does not dress unless she has to.*
>
> • *The Members take the view that this is* a *lifestyle choice and prompting would make no difference to the Appellant who prefers to spend* most *of her time in bed"*
>
> We would suggest that this is an irrational decision. The reason why the Appellant "prefers to stay in her pyjamas" is due to mental health conditions depriving her of the motivation to get dressed. It is for this very reason she would require prompting and why this descriptor exists under the PIP Regulations. It is especially irrational not to award points for prompting for dressing when the Appellant has been deemed to require prompting for other activities,

particularly washing and bathing which would require similar motivation to maintain a kempt appearance.

While we accept it is possible for a claimant to require prompting for one task but not another, we do not accept that the Tribunal has sufficiently explained why it believes the Appellant requires prompting under other Daily Living activities but not for dressing. Had the Appellant been awarded 2 points under Daily living descriptor 6(c), this would have led to an overall award of 9 points in Daily Living and so would constitute a material error of law.'

23. Mr Killeen replied to this ground of appeal as follows:

> 'Mr Black notes that (the appellant) has been awarded points for prompting for Washing and bathing and Engaging with other people. He accepts that while it is possible to require prompting for one task but not another, the tribunal has not sufficiently explained why it believes (the appellant) can dress and undress without prompting.
>
> As noted by Mr Black, the tribunal accepted that (the appellant) required prompting for other activities, for example Activity 5 washing or bathing. In the reasons for the decision the tribunal provided the following explanation for its finding;
>
> > *"(d) Washing etc:*
> >
> > *In the PIP2 the Appellant indicated that she needed prompting with this and she repeated this to the Disability Assessor. She does not dispute that she has any physical problem with this activity or that she needs supervision or assistance.*
> >
> > *We accept she needs prompting – 4(b) 2 points."*
>
> The Tribunal appear to accept the difficulties reported by (the appellant) without reference to other evidence. In regards to the activity in question, I note the following excerpts from the record of proceedings;
>
> > *"The Appellant told us that at the date of the decision 14.2.18 her mental health was impacting everything. She said that she did not want to go out or do anything. She said that stayed in bed unless someone came in… She only got out of bed for a drink. She*

wouldn't open the door unless she knew who it was…

Dressing:

The Appellant told us that she doesn't dress unless she has to. She just stays in her pyjamas but she can dress if she has to go out."

I note the following excerpt from the statement of reasons;

"(f) Dressing:

In the PIP2 and to the Disability Assessor the Appellant said she needed prompting with this.

However in her oral evidence she indicated that while she can physically do it and does not need assistance or supervision, she prefers to stay in her pyjamas and she does not dress unless she has to. She told us 'I can dress to go out'.

The Members take the view that this is a lifestyle choice and prompting would make no difference to the Appellant who prefers to spend most of her time in bed."

In her PIP2 application form (the appellant) indicated she did not use an aid or appliance to dress or undress but that she did need help from another person requiring encouragement to get dressed due to low mood and anxiety. In the Disability Assessors report it is recorded that she needs prompting to dress and undress due to her lack of motivation and low mood. I submit that the Tribunal has not adequately explained how, based on the same evidence, it found (the appellant) required prompting to wash or bathe but did not require prompting to dress and undress.

I also note the evidence states (the appellant) attends appointments and sometimes goes shopping with her daughter. Having reviewed the record of proceedings it is not evident that the Tribunal queried if (the appellant) requires prompting, reminding or encouraging for her to dress appropriately when leaving her house.'

I would therefore support Mr Black's contention that the Tribunal has made irrational findings regarding Activity 6 and as such, has made a material error.'

24. I accept this analysis by Mr Killeen.

My further finding of fact, additional scoring, and revised decision

25. My further finding of fact, based on an analysis of all of the evidence, which is before me, is that the appellant needs prompting to dress and undress due to her lack of motivation and low mood. I consider, therefore, that descriptor c(i) of activity 6 in Part 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 1999, as amended, is applicable. Descriptor c(i) attracts a score of 2 points. When added to the 7 points for other activities in Part 2 awarded by the appeal tribunal the appellant reaches the threshold Score for entitlement to the standard rate of the daily living component of PIP.

26. The appellant's current representative, Ms Rothwell of the law Centre NI, informs me that on a further claim the appellant was awarded an entitlement to the enhanced rate of both the daily living and mobility components of PIP from 29 October 2021 to 31 January 2026. The period of the award, therefore, will be from 21 March 2018 to 28 October 2021.

(signed): K Mullan

Chief Commissioner

2 November 2022