JNMcH-v-Department for Communities (PIP) [2022] NICom 4

Decision No: C32/21-22(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 9 September 2020

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 ST/04788/20/03/D.

2. For the reasons I give below, I grant leave to appeal. I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I direct that the appeal shall be determined by a newly constituted tribunal.

3. I direct that the appellant should be afforded a further opportunity to decide if he wishes to attend an oral hearing to explain his needs in greater detail.

REASONS

Background

4. The appellant had previously been awarded disability living allowance (DLA) from 28 June 2010, most recently at the low rate of the mobility component and the middle rate of the care component. As his award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, he claimed personal independence payment (PIP) from the Department for Communities (the Department) from 22 January 2019 on the basis of needs arising from diabetes, anxiety, depression, high blood pressure and high cholesterol. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 18 February 2019. He asked for evidence relating to his previous DLA claim to be considered. The

appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 28 March 2019. On 14 June 2019 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 22 January 2019. The appellant requested a reconsideration of the decision, submitting further evidence. A general practitioner factual report was obtained. The appellant was notified that the decision had been reconsidered by the Department but not revised. He appealed, but waived the right to attend an oral hearing of the appeal.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on the papers, on 12 September 2020 the tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 12 August 2021. The appellant 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 September 2021. On 6 October 2021 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant submits that the tribunal has erred in law by:

   (i) not taking his diabetes seriously, referring to hypoglycaemic episodes;

   (ii) not taking his depression seriously enough, setting out aspects of his daily living needs;

   (iii) not accepting that his health is worse than when he received DLA.

7. The Department was invited to make observations on the appellant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted that the tribunal had materially erred in law. He indicated that the Department supported 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 appellant and a consultation report from the HCP. As the appellant had waived his right to an oral hearing, the appeal proceeded on the papers.

9. The tribunal noted that the appellant suffered from insulin-dependent diabetes, anxiety, depression and high blood pressure and cholesterol levels. It noted that the appellant disputed the daily living activities of

"Preparing food" and "Managing a therapy or health condition" in addition to the mobility activity of "Planning or following the route of a journey". The tribunal addressed itself to all of the daily living and mobility activities. With the exception of "Engaging with other people", it found no evidence on which it could conclude that the appellant had significant problems with the daily living activities so as to bring him within the other scoring activities. It similarly found insufficient evidence to indicate a significant problem with any of the mobility activities such as to bring him within the relevant scoring activities.

Relevant legislation

10. 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.

Assessment

13. 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.

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

15. 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.

16. In his grounds, the appellant submitted that the tribunal had made mistakes as to material facts and reached perverse findings. He submitted that his condition had not improved since he received DLA, but had deteriorated. He disputed his ability to prepare food and manage medication and his ability to follow a route due to anxiety and hypoglycaemic episodes.

17. Mr Killeen for the Department said as follows:

"I note from the Statement of Reasons that:

> *"…the Tribunal could not discern sufficiently reliable evidence from the available material from which we could conclude that the Appellant was under a form of limitation… neither could we speculate."*

This, or a paraphrased version of it was used in the reasoning for Preparing food, Managing therapy or monitoring a health condition, Washing and bathing, Planning and following the route of a journey and Moving around.

I would draw particular attention to its reasoning for Managing therapy or monitoring a health condition:

> *"The Tribunal was not able to discern enough sufficiently reliable evidence from the available material to permit us to conclude that the Appellant was under a form of limitation or restriction in managing therapy and/or monitoring a condition; neither could we speculate about this activity. We noted what was said in his letter of appeal and in the appeal form about a purported requirement for someone to be present when taking his medicine but looking at the kind of diabetes from which he suffers this seemed in the considered professional experience of the Tribunal to be excessive given that there did not appear to be any impairment to his cognition…"*

Given the composition of a tribunal includes a medically qualified member and a disability qualified member, I submit that the tribunal was entitled to rely on this experience when giving its opinion, that due to the lack of any impairment to [the appellant]'s cognition he could complete this activity without significant restriction.

As noted above, the tribunal indicates on several occasions that it did not have sufficiently reliable evidence to indicate that [the appellant] had limitations or functional restrictions. With this in mind, I note the following excerpts from the Documents Considered and the Record of Proceedings:

> *"Submission papers consisting of Dfc submissions on appeal, medical report, copy PIP 2016 regs*

The Appellants Appeal (NOA1)
PIP Application form
HCP report of 28/03/2019"

…

> *"Because the Appellant exercised his right to have the Tribunal deal with his case 'on the papers', this decision is formulated on the basis of the documentary evidence provided to us in the form of the submission papers prepared by the Department."*

The tribunal does make specific reference to any of the supporting evidence supplied by [the appellant] or the Department, though this is not necessarily an error of law as it is contained in the Department's submission papers.

Where the tribunal have arguably erred in law is in failing to address the GP Factual Report dated 22 May 2019 by Dr McMenamin or the GP letter dated 23 August 2019 from Dr Gallagher. Both contain comments on [the appellant]'s ability to manage his diabetic condition:

GP Factual Report:

> *"type 1 DM – frequent hypos recently… little awareness of hypos needs supervision… needs help and supervision with BM checks little awareness of hypos"*

GP letter:

> *"…has recently being experiencing frequent hypoglycaemic events and has reduced hypo awareness and has required help from others during these events."*

This evidence from 2 separate medical professionals is in conflict with the separate observations of the healthcare professionals that [the appellant] has good cognition that would allow him to manage his diabetic condition. Given the tribunals reasoning, it is apparent it preferred the evidence of the healthcare professionals and it is entitled to do so provided there is an explanation.

However, having read the Statement of Reasons in full, the tribunal has not provided any explanation and as noted above it does not explicitly acknowledge the evidence form the GPs. Therefore, there is merit in [the appellant]'s

contention that the tribunal did not adequately address the risk of danger he could experience due to the hypoglycaemic events he experiences.

In unreported NI decision C14/08-09(DLA), the then Commissioner Mullan (now Chief Commissioner) stated that:

> *"33. There is a clear duty on appeal tribunals to undertake a rigorous assessment of all of the evidence before it and to give an explicit explanation as to why it has preferred, accepted or rejected evidence which is before it and which is relevant to the issues arising in the appeal.*
>
> *In R2/04(DLA) a Tribunal of Commissioners, stated, at paragraph 22(5):*
>
> > *' … there will be cases where the medical evidence before a particular tribunal will be unsatisfactory or deficient in an important respect. It will often be open to the tribunal hearing such a case to reject the medical evidence for that reason. Indeed, it will sometimes be its duty to do so. However, and in either case, the tribunal cannot simply ignore medical evidence which is not obviously irrelevant. It must acknowledge its existence and explain its reasons for rejecting it, even if, as will often be appropriate, such reasons are fairly short. We repeat, the decision whether a person suffers from a particular medical condition is a matter for the tribunal. That body must have regard to the whole of the evidence, including the medical evidence. Where it rejects medical evidence it must, unless the reasons are otherwise apparent, explain why it does so. Anything less is likely to result in an appeal being brought on the grounds that the tribunal has not given adequate reasons or that its*

decision is against the weight of the evidence.'

34. As has already been noted, contained within the factual report of the appellant's GP, there is evidence which, arguably, is supportive of the appellant's claim to the care component of DLA, and which is more relevant to the circumstances obtaining at the date of the decision under appeal, and relevant to the appellant at that same date. In its SORs the majority of the appeal tribunal has made no reference to the report from the GP. The SORs for the majority decision gives no indication as to how that medical evidence was assessed and whether or not it was accepted or rejected."

As in this case, the tribunal failed to deal with a conflict of evidence regarding [the appellant]'s management of diabetes, and in turn failed to adequately assess and address whether or not [the appellant] could carry out relevant activities safely as is required by Regulation 4(3) of the Personal Independence Payment Regulations (Northern Ireland) 2016, which provides:

"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-

(c) safely"

(C means a person who has made a claim for Personal Independence Payment)"

18. I acknowledge that there is merit in the submission of Mr Killeen. On the basis that he offers support for the application, I grant leave to appeal.

19. The tribunal had the difficulty, in the appellant's absence, of seeking to glean all its evidence from the documents before it. The appellant had referred to "hypos" in his self-assessment questionnaire. The tribunal acknowledged these statements, but had not considered them sufficiently reliable evidence from which to conclude the appellant was under a relevant limitation.

20. However, as pointed out by Mr Killeen the tribunal had referred to a number of documents expressly, but not the GP factual report or GP letter. Each of these had indicated supervision needs with blood monitoring and reduced awareness of hypos, with regular hypoglycaemic events. While their omission from the list of documents considered does not necessarily

indicate that they were not considered, the text of the record of proceedings does not suggest any awareness of them on the part of the tribunal.

21. This is a case where the relevant number of points claimed for daily living and mobility may not be enough to lead to an award, and that a material error in the sense of conclusively affecting the outcome may not have occurred. However, it appears that procedural unfairness may have been present if the particular documents were overlooked. It is akin to the setting aside jurisdiction under regulation 57 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999, when a document may not have been placed before the tribunal at the appropriate time. In cases such as the present one, such an oversight may affect the tribunal's overall assessment of credibility going beyond particular descriptors. I consider that it is enough that the error may potentially have affected the outcome in order to give rise to an error of law.

22. I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination. I direct that the appellant should be afforded a further opportunity to decide if he wishes to attend an oral hearing to explain his needs in greater detail.

(signed): O Stockman

Commissioner

2 February 2022