AMC-v-Department for Communities (PIP) [2018] NICom 58

Decision No: C14/18-19(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 27 September 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 27 September 2017 is in error of law. The error of law identified will be explained in more detail below. 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.

2. For further reasons set out below, I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. An appeal tribunal which has a Medically Qualified Panel Member is best placed to assess medical evidence and address medical issues arising in an appeal. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.

3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.

4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of her entitlement to Personal Independence Payment (PIP) remains to be determined by another appeal tribunal. In accordance with the guidance set out below,

the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

Background

5. On 1 November 2016 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 21 July 2016. Following a request to that effect, the decision dated 1 November 2016 was reconsidered on 14 November 2016 but was not changed. An appeal against the decision dated 1 November 2016 was received in the Department on 15 December 2016.

6. Following an earlier adjournment and a postponement, the substantive appeal tribunal hearing took place on 27 September 2017. The appellant was present, was accompanied by her husband and was represented by Ms McCabe of the Citizens Advice organisation. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 1 November 2016. The appeal tribunal did apply descriptors from Part 2 and Part 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 component of PIP – see article 83 of the Welfare Reform (Northern Ireland) Order 2015 and regulation 5 of the 2016 Regulations.

7. On 16 February 2018 an application for leave to appeal was received in the Appeals Service (TAS). On 26 February 2018 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 12 March 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 12 April 2018 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 4 May 2018, Mr Hinton, for DMS, supported the application for leave to appeal on two of the grounds advanced by the appellant. Written observations were shared with the appellant on 3 May 2018.

9. On 31 October 2018 I granted leave to appeal giving, as a reason, that certain of the issues raised in the grounds of appeal were arguable. On the same date I determined that an oral hearing of the appeal would not be required.

Errors of law

10. 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?

11. 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');
>
> (ii) failing to give reasons or any adequate reasons for findings on material matters;
>
> (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> (iv) giving weight to immaterial matters;
>
> (v) making a material misdirection of law on any material matter;
>
> (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

12. In his carefully prepared written observations on the application for leave to appeal, Mr Hinton made the following response to two of the grounds of appeal advanced by the appellant:

> '***Issue 2***
>
> ***Activity 4 – washing and bathing. The tribunal failed to make reference to this activity in the statement of reasons, only in the record of proceedings. The tribunal seemed to assume (the appellant) had a higher level of functional ability because she***

provided care for her daughter. However, the tribunal failed to establish the nature of the care provided and whether it was supervisory or involved physical assistance. Therefore, its reasons are inadequate.

Regarding (the appellant's) comments concerning the nature of care she provided for her daughter the tribunal addressed this issue in its reasoning as follows:

> *"… In fact Dr K refers to the importance of (the appellant) being able to maintain the progress that she has made and that she worries about not being able to care for her daughter without help. This suggests a level of activity which although not describing full functioning ability, is at odds with the evidence given to the Tribunal of complete inability to carry out any task".*

In line with the above the tribunal recognised the limitations imposed on (the appellant) regarding caring for her daughter; however I would contend it was correct to conclude that she was able to provide some form of limited assistance in this area.

The following was recorded in the proceedings;

> *"Need help all the time with washing? Can you manage at hand basin?*
>
> *Appellant – Husband is there all the time, to keep you steady. No grab rails – nothing to steady you".*

(The appellant) in her self-assessment form stated that she needed an aid or appliance to wash and bathe along with help from another person. This was at odds with the assessment of the health professional who stated that she could wash and bathe unaided safely and in an acceptable manner. However, further evidence submitted from the GP and (the appellant's) representative along with her own evidence provided at the hearing (she states her husband helps her in the shower) would indicate possible problems in this area. I would contend therefore that the tribunal as a higher adjudicating authority had a duty to assess entitlement regarding washing and bathing in its reasoning. It might have found that (the appellant) had no needs in this area, however the fact that she had reduced power in her left hand (dominant hand) merited further comment from the tribunal regarding her ability to

perform this activity. Consequently, by its failure to comment on this issue in its reasoning the tribunal has erred in law.

Issue 3

Activity 6 – dressing and undressing. No reference was made to this activity in the statement of reasons. It appears it interpreted (the appellant's) caring responsibilities as evidence that she had a higher level of functional ability than claimed. Consequently its reasoning was inadequate.

In the record of proceedings (the appellant) submitted the following information:

> *"Husband helps you undress, helps you dress…*
>
> *What happens when you do buttons?*
>
> *Appellant – Get tingling. No power at all in left arm".*

In a similar vein to the activity of washing and bathing, I notice the tribunal has not commented in its reasoning on (the appellant's) evidence with regards to dressing and undressing. I would contend that owing to (the appellant's) restrictive function in her left arm along with her contention that she required assistance from her husband, the tribunal had a duty to assess this evidence in greater detail and comment on it. Its failure to do so renders it's reasoning inadequate; consequently it has erred in law.'

13. I am mindful that in *Quinn v Department for Social Development* ([2004] NICA 22), the Court of Appeal emphasised that assessment of evidence and fact-finding role is one for the appeal tribunal. At paragraph 29, the Court stated:

> 'It is clear that the Tribunal considered Dr M's report since they refer to it in their findings and describe it as being less than helpful. The challenge to the Tribunal's attitude to the report cannot proceed on the basis that they ignored it; rather it must be either that they misconstrued it or they failed to give it sufficient weight. As to the latter of these two possibilities it is of course to be remembered that a view of the facts reached by a tribunal can only be interfered with by the Court of Appeal in limited and well-defined circumstances.

Carswell LCJ described those circumstances in *Chief Constable of the RUC v Sergeant A* [2000] NI 261 at 273f as follows: -

> "A tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless—
>
> (a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the tribunal (*Fire Brigades Union v Fraser* [1998] IRLR 697 at 699, per Lord Sutherland); or
>
> (b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36."

14. At paragraph 4 of *R(DLA) 3/04*, Mrs Commissioner Brown had made similar remarks:

> 'I should state at the outset that the weight to be given to any evidence is completely a matter for the Tribunal. The weight to be given to an item of evidence is a matter of fact. That means that I can disturb it only if that conclusion as to weight is one which no reasonable Tribunal could have reached. Having examined Dr M...'s report I do not consider that the Tribunal's conclusions as to the weight to be given to it are such as no reasonable Tribunal could have reached.'

15. That the assessment of evidence is primarily a matter for the appeal tribunal includes the assessment of credibility. 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.'

16. 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.'

17. 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".

18. Accordingly an appellate body such as a Social Security Commissioner should be reluctant to interfere with evidential assessment and fact-finding process. In the instant case, however, I am satisfied that the appeal tribunal has not undertaken a sufficiently rigorous assessment of the potential applicability of activities 4 and 6 in Part 2 of Schedule 1 to the 2016 Regulations. The potential applicability of these activities was an issue raised by the appeal. The appellant had indicated in the self-assessment form completed on 11 August 2016 and a copy of which was attached to the appeal submission as Tab No 2 that she had difficulties in these areas. Further, the issue was raised by the appellant's representative in the written submission prepared for the appeal tribunal hearing. Finally, there was medical evidence, including a report from the Cancer Centre at Belfast City Hospital which supported the potential applicability of activities 4 and 6.

19. I find, therefore, that the decision of the appeal tribunal is in error of law and I set it aside. I do so with a degree of reluctance, however, given the appeal tribunal's careful and judicious management of the other aspects of the appeal, and its circumspectly prepared statement of reasons.

Disposal

20. The decision of the appeal tribunal dated 27 September 2017 is in error of law. 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.

21. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:

    (i) the decision under appeal is a decision of the Department dated 1 November 2016 in which a decision maker of the Department decided that the appellant was not entitled to PIP from and including 21 July 2016;

    (ii) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and

    (iii) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed): K Mullan

Chief Commissioner

19 November 2018