

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

DISABILITY LIVING ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 28 November 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 28 November 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. 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 Disability Living Allowance (DLA) 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 29 October 2015 a decision maker of the Department decided that the appellant was not entitled to DLA from and including 11 December 2015. Following a request to that effect, and the receipt of additional evidence, the decision dated 29 October 2015 was reconsidered on 25 November 2015 but was not changed. An appeal against the decision dated 29 October 2015 was received on 18 December 2015. Following receipt of additional correspondence from the appellant's representative, a further reconsideration of the decision dated 29 October 2015 was undertaken on 4 March 2016 but was not changed.
6. The initial appeal tribunal hearing took place on 18 April 2016. The appeal was disallowed and the appeal tribunal confirmed the Departmental decision dated 29 October 2015. Subsequently an appeal to the Social Security Commissioners was successful. In a decision dated 17 February 2017 I set aside the decision of the appeal tribunal dated 18 April 2016 and remitted the appeal for re-hearing before a differently-constituted appeal tribunal.
7. The oral hearing before the new appeal tribunal took place on 28 November 2017. The appellant was present, was accompanied by her husband and was represented by Mr McCloskey then of the Legal Support Project. The appeal tribunal disallowed the appeal confirming the Departmental decision of 29 October 2015. On 2 May 2018 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 29 May 2018 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 19 June 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. The appellant was, once again, represented in the application by Mr McCloskey, but now of the Law Centre (Northern Ireland). On 4 July 2018 observations on the application for leave to appeal were requested from Decision Making Services ('DMS'). In written observations dated 1 August 2018, Mrs Coulter, for DMS, supported the application for leave to appeal on several of the grounds advanced on behalf of the appellant. The written observations were shared with the appellant and Mr McCloskey on 1 August 2018. Written observations in reply were received from Mr McCloskey on 20 August 2018 and were shared with Mrs Coulter on 3 September 2018.
9. On 29 January 2019 I granted leave to appeal. When granting leave to appeal I gave as a reason that certain of the grounds of appeal, as set

out in the application for leave to 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 the application for leave to appeal, Mr McCloskey made the following submissions:

‘The record of proceedings does not reflect the fact that the appellant wished to submit her electronic blood checker for review as evidence. A request was made via the clerk prior to the appeal to submit this evidence but we were advised that the panel refused to review this evidence.

There was a significant exchange at the beginning of the hearing in which the appellant was questioned about the content of the GP records and the tribunal's understanding of the blood checker.

...

I have attached my written note of the tribunal. The record of proceedings is inadequate in its failure to note matters which may have been material such as the refusal to consider available evidence and to reflect the manner of questioning from the outset which outlined the tribunal's view that there was no record of hypos in the in the clinical records.

It is submitted that the tribunal had breached the rules of natural justice as it refused to consider evidence on the electronic blood checker documenting the occurrence of low blood sugar levels. Evidence was given that this was the basis of the clinical recording in the GP records on 17 November 2015 that sugar levels were 2.1-3.6 most mornings. Oral evidence was given that the blood checker would keep a record of sugar levels for 8-9 weeks. As a result this was relevant in corroborating the appellant's account that the GP was able to check during the consultation on 17 November 2015 the occurrence of hypos at or around the decision on 29 October 2015.'

13. In her written observations, Mrs Coulter made the following submission in reply to those advanced by Mr McCloskey:

'It is further contended the record of proceedings does not reflect the questioning used during the oral hearing which demonstrated the tribunal focused on evidence that did not support the occurrence of night time hypos. (The appellant) states she had wished to submit her electronic blood checker as evidence at the hearing but the panel refused this. Furthermore, the appellant contends that she made submissions in her oral testimony concerning her clinical sugar levels which have not been noted in the transcript of proceedings and that she advised the panel that her blood checker would keep a record of sugar levels for 8-9 weeks and that this information corroborated that recorded by Dr T at the consultation of 17 November 2015.

Unfortunately as I was not at the hearing I cannot offer any definitive comments on this ground of appeal. That aside, I would however expect a tribunal to make some form of notation in the record of proceedings if it was

refusing to consider any form of evidence presented to them from any party to the proceedings and include its reasons for doing so. Failure to do so would amount to a denial of a right to a fair hearing which in turn would constitute an error in law.’

14. I have a copy of the note of the appeal tribunal proceedings which was completed by Mr McCloskey and it corroborates that the appeal tribunal had refused an application to ‘review’ the blood checker. It also confirms that there was an exchange between the LQPM and the appellant and her husband about the readings on the blood checker and how they were recorded and retained. In the formal record of proceedings for the appeal tribunal hearing, and in the statement of reasons for the appeal tribunal’s decision, there is no record of the making of an application to the appeal tribunal to review the blood checker and no statement of reasons why any such application was refused.

15. In *C28/09-10(DLA)*, I stated the following, at paragraph 73:

‘It cannot be emphasised enough that any interaction, intervention, or action which relates to an appeal tribunal session or oral hearing of an individual appeal, should be accurately recorded in the ROPs for the appeal tribunal hearing, or otherwise noted by the clerk to the appeal tribunal, in a session report. In the present case, a note of the relevant interaction in the ROPs may have avoided the detailed submissions relating to this issue which the appellant made in her application for leave to appeal.’

16. Applying those principles to the present appeal, I do not understand why the LQPM did not note, in the record of proceedings for the appeal tribunal hearing, that an application to admit certain evidence had been made and had been refused. Much more significantly, I do not comprehend why the LQPM did not include a statement of the reasons, however brief, why the application was refused. I am of the view that Mr McCloskey, having made the application, was entitled to know why it had been refused.

17. Was the refusal to admit the evidence material? The statement of reasons includes a comprehensive analysis of certain of the medical evidence which was before the appeal tribunal. That assessment included a comparison between a Factual Report, completed by the appellant’s General Practitioner (GP) on 1 September 2015 and a further written report from the same GP dated 17 November 2015. The report dated 17 November 2015, did, of course, post-date the decision under appeal. Nonetheless, the appeal tribunal determined:

‘... the Tribunal accept same as being a relevant report. It is stated [*sic*] shortly after the date of the decision and is within the period of renewal.’

18. Save for the minor typographical error ('stated' should obviously be 'dated'), there is nothing wrong with that determination.
19. Following a detailed analysis of the two pieces of evidence, the appeal tribunal concluded:

'The tribunal find therefore that the report of Dr T dated 17 November 2015 is not reflective of the Claimant's condition as at the date of the decision dated 29 October 2015. The tribunal find that the report from Dr T dated 1 September is a more accurate summary of the medical history of the Claimant as confirmed by the General Practitioner notes and records.'

20. As was noted above, Mr McCloskey asserted that evidence had been given that the blood checker was the basis of the '... clinical recording in the GP records on 17 November 2015 that sugar levels were 2.1-3.6 most mornings.' Further, he submitted that oral evidence was adduced that the blood checker would keep a record of sugar levels for 8 to 9 weeks. Accordingly, the evidence from blood checker was '... relevant in corroborating the appellant's account that the GP was able to check during the consultation on 17 November 2015 the occurrence of hypos at or around the decision on 29 October 2015.'
21. My own researches have confirmed that while there are different types of blood check monitors, certain models will keep records for periods of time. Indeed it is possible to have monitors which will retain data for a lengthy period and which enable such data to be downloaded to a computer.
22. In my view, it is clear that the evidence which Mr McCloskey wished to adduce before the appeal tribunal and which the appeal tribunal refused to consider, was relevant to a significant issue raised by the appeal. Further, it is arguable that the appeal tribunal's assessment of the evidence relevant to that issue might have been different had the appeal tribunal permitted itself access to the further evidence. Logically, therefore, the appeal tribunal might have arrived at different evidential conclusions and, overall, a different decision. For this reason, the decision of the appeal tribunal is in error of law.

Disposal

23. The decision of the appeal tribunal dated 28 November 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.
24. 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 29 October 2015 in which a decision maker of the Department decided that the appellant was not entitled to DLA from and including 11 December 2015;

(ii) the Department is directed to provide details of any subsequent claims to DLA and the outcome of any such claims to the appeal tribunal to which the appeal is being referred. The appeal tribunal is directed to take any evidence of subsequent claims to DLA into account in line with the principles set out in *C20/04-05(DLA)*;

(iii) 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

(iv) 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

13 March 2019