TH-v-Department for Communities (PIP) [2022] NICom 13

Decision No: C33/21-22(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 30 April 2021

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 30 April 2021 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. 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.

3. 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

4. In the appeal submission which was prepared for the hearing of the appeal, the appeal writer has submitted that on 21 January 2021 a decision maker of the Department superseded an earlier decision of the Department and decided that the appellant was not entitled to either component of PIP from and including 17 November 2020. The earlier decision, itself dated 1 September 2017, had awarded the appellant an entitlement to the enhanced rate of the daily living component and the standard rate of the mobility component of PIP from and including 17 January 2017. As will be noted below, it is now the Department's position that the decision of 21 January 2021 was not a supersession decision but rather a decision on a new claim to PIP. In any event, following a request to that effect, the decision dated 21 January 2021 was reconsidered on 11 March 2021 but was not changed. An appeal against the decision dated 21 January 2021 was received in the Department on 11 March 2021.

5. The appeal tribunal hearing took place on 30 April 2021. The format of the hearing was described in the record of proceedings as a 'paper hearing'. The appellant did not participate in the hearing and was not represented. The appellant had completed and signed a form on 20 September 2021 in which she ticked a box to indicate that she wished her appeal to be dealt with by way of a paper determination. She also agreed that she understood that by choosing this option she would not be notified in advance of the date and time that her hearing would take place. A Departmental Presenting Officer did not participate in the hearing. The appeal tribunal disallowed the appeal and confirmed the decision dated 21 January 2021.

6. On 4 November 2021 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). On 17 November 2021 the Legally Qualified Panel Member (LQPM) determined that the application for leave to appeal should be refused.

Proceedings before the Social Security Commissioner

7. On 16 December 2021 a further application for leave to appeal was received in the office of the Social Security Commissioners. On 5 January 2022 observations on the application for leave to appeal were requested from Decision Making Services ('DMS'). In written observations dated 21 January 2022, Mr Killeen, for DMS, supported the application for leave to appeal on grounds identified by him. Written observations were shared with the appellant on 26 January 2022.

8. On 22 February 2022 I granted leave to appeal. I gave as a reason that it was arguable that the appeal tribunal's reasons are inadequate to explain its conclusions with respect to the potential applicability of certain of the activities in Part 2 of Schedule 1 to the Personal Independence Payment (Northern Ireland) Regulations 2016, as amended. On the same date I determined that an oral hearing of the appeal would not be required.

Errors of law

9. 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?

10. 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

11. In his w observations on the application for leave to appeal, Mr Killeen noted the error in the description within the appeal tribunal of the nature of the decision under appeal. He then made the following submissions:

> '(The appellant) was previously awarded the Daily Living component at the Enhanced rate and the Mobility component at the Standard rate. She contends her circumstances haven't changed.
>
> The tribunal noted her medical conditions are *"Depression and anxiety with agoraphobia for over 3 years"*. In her

previous claim a tribunal awarded her 10 points for descriptor e of Mobility activity 1 “Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant” for Planning and Following Journeys. Considering the nature of agoraphobia, descriptor E is in my view a probable one.

The tribunal, for the current claim upheld the Department’s decision, awarding 0 points for either component of Personal Independence Payment. It provided the following reasons for awarding descriptor A for (Can plan and follow the route of a journey unaided) Planning and Following Journeys:

> *“In her questionnaire (the appellant) said she did not go out and could not leave the house. She said she had been diagnosed with chronic social anxiety and hadn’t used public transport in 16 years. The Assessor noted that (the appellant) was not prescribed any anti-anxiolytic medication and noted no increase in her anxiety when discussing leaving her home. She could use a taxi. The Tribunal preferred the evidence of the Assessor and awarded 0 points.”*

In the GB decision, SF v SSWP (PIP) [2016] UKUT 0481 (AAC), Upper Tribunal Judge Wikeley

> *“17. Ground 2 is that the FTT had failed to explain adequately, or at all, why the decision differed from the previous award. Mr Bernard argued that where there was such a gross disparity between the two decision makers’ PIP decisions then it was incumbent on the tribunal to explain why the outcome was different on the second occasion. In particular, he suggested, the tribunal needed to explain whether the initial award had been too generous and/or whether there had been a significant change in circumstances affecting the Appellant’s functional abilities. In this respect Mr Bernard relied upon Social Security Commissioner Howell QC’s decision in R(M) 1/96. The passage that Mr Bernard doubtless has in mind is this:*
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> *“15. It does however, seem to me to follow from what is said by the Court of Appeal in Evans, Kitchen & Others, that while a*

previous award carries no entitlement to preferential treatment on a renewal claim for a continuing condition, the need to give reasons to explain the outcome of the case to the claimant means either that it must be reasonably obvious from the tribunal's findings why they are not renewing the previous award, or that some brief explanation must be given for what the claimant will otherwise perceive as unfair. This is particularly so where (as in the present and no doubt many other cases) the claimant points to the existence of his previous award and contends that his condition has remained the same, or worsened, since it was decided he met the conditions for benefit. An adverse decision without understandable reasons in such circumstances is bound to lead to a feeling of injustice and while tribunals may of course take different views on the effects of primary evidence, or reach different conclusions on the basis of further or more up to date evidence without being in error of law, I do not think it is imposing too great a burden on them to make sure that the reason for an SF v SSWP (PIP) [2016] UKUT 0481 (AAC) CPIP/1693/2016 5 apparent variation in the treatment of similar relevant facts appears from the record of their decision.

16. Relating this to attendance or mobility cases, if a tribunal, in a decision otherwise complying with the requirements as to giving reasons and dealing with all relevant issues and contentions, records findings of fact on the basis of which it plainly appears that the conditions for benefit are no longer satisfied (e.g. a substantial reduction in attendance needs following a successful hip operation, or the claimant being observed to walk without discomfort for a long distance) then in my judgment it is no error of law for them to omit specific comment on an earlier decision awarding benefit for an earlier period. Their reason for a different decision is obvious from their finding. In cases where the reason does not appear obviously from the findings and reasons given for the actual conclusion reached, a short explanation

should be given to show that the fact of the earlier award has been taken into account and that the tribunal have addressed their minds for example to any express or implied contention by the claimant that his condition is worse, or no better, than when he formerly qualified for benefit. Merely to state a conclusion inconsistent with a previous decision, such as that the tribunal found the claimant "not virtually unable to walk" without stating the basis on which this conclusion was reached, should not be regarded as a sufficient explanation, and if the reason for differing from the previous decision does not appear or cannot be inferred with reasonable clarity from the tribunal's record, it will normally follow in my view that they will be in breach of regulation 26E(5) and in error of law."

19. …In my view an unduly narrow focus on the jurisdictional niceties of reliance upon regulation 26 loses sight of the fundamental and much wider principle of justice, namely that a party (and, in particular, a losing party) is entitled to adequate reasons for the tribunal's decision. It is important to bear in mind the Appellant's perspective. In July 2014 he was awarded the enhanced rate of the daily living component of PIP on the basis of a score of 16 points, such award to run for a further 2 years. However, a little over a year later, applying precisely the same rules, he scored 0 points and his PIP award was terminated. In those circumstances it is entirely understandable that the Appellant may well be bemused.

20. There is ample authority for the proposition that the system should avoid a situation in which decision makers give "contrary decisions which the general public, and particularly those afflicted by disabling conditions and those associated with them and who care for them, do not understand, and is apt to produce a feeling of injustice" (Commissioner's decision R(A) 2/83 at paragraph 5). Thus consistency in decision making is an obvious public law good (see R (Viggers) v Pension Appeal Tribunal [2009]

EWCA Civ 1321; [2010] AACR 19 at paragraph 22 per Ward LJ). This is not to say that apparently inconsistent decisions on successive claims/awards SF v SSWP (PIP) [2016] UKUT 0481 (AAC) CPIP/1693/2016 6 cannot be rationalised (see Viggers v Secretary of State for Defence [2015] UKUT 119 (AAC)).”

Considering the above, I am of the view the tribunal has not adequately explained its reasons for this activity and as a result has made a material error. It is not sufficiently clear why the tribunal found why (the appellant) can now leave the house without experiencing overwhelming psychological distress.’

12. In *LO’H-v-Department for Communities (PIP)* ([2021] NICom 60), I said the following in paragraphs 14 and 15:

In *MM-C v SSWP (CPIP)* ([2021] UKUT 183 (AAC) (‘*MM-C*’)) Upper Tribunal Judge Hemingway said the following at paragraphs 6 to 8 of the decision.

6. It has long been established that an F-tT has to provide adequate reasons for its decision on an appeal. Whilst a little more than that might be desired, adequacy, not more than that, is the standard. Where entitlement to a benefit is changed (particularly where it is reduced or extinguished) as a result of a decision on an appeal, there may in certain circumstances be an obligation, as part of the overall duty to give adequate reasons, to explain the change.

7. The classic analysis of the duty to give reasons where an award of a particular benefit changes may be found in *R(M) 1/96*.

(Here Judge Hemingway set out paragraphs 15 and 16 of the decision in *R(M) 1/96* as noted by Mr Killeen in his written observations as set out above).

8. In *SF v SSWP (PIP)* [2016] UKUT 0481 (AAC), which concerned a claimant who had originally been awarded PIP but had subsequently had that award taken away by way of a supersession decision, the Upper Tribunal made a strong statement to the effect that, in such circumstances, the principle in *R(M) 1/96* would apply. In *YM v SSWP (PIP)* [2018] UKUT 16 (AAC) the Upper Tribunal considered what the situation might be where, as here, a claimant had converted from DLA to PIP. It was

said that, in such cases, the principle would potentially come into play in circumstances where there was a potential overlap between certain DLA tests and PIP tests such that in some cases there would be a need to explain "apparently divergent decisions". In *CH* and *KN*, a submission made on behalf of the Secretary of State to the effect that procedural and substantive differences between DLA and PIP meant any perception of inconsistency between awards would simply be a result of an individual's lack of understanding or appreciation of those differences, was rejected. Further, the approach taken in *YM* was approved in this way *"Accordingly, I agree with Judge Ward's approach at [21] of YM in setting out the principle but no rule of law beyond that. It is for the tribunal to judge in the circumstances of a particular case whether there is an apparent inconsistency such that reasons are called for"*. It was also stressed that the principle in *R(M) 1/96* and the Upper Tribunal's application of it to cases of conversion from DLA to PIP in *YM* "does not place an undue burden on the tribunal". It was pointed out that it had been made clear in *YM* that an F-tT was not required to engage in comparative reasoning for the difference between DLA and PIP awards and that "deciding whether there is a duty to provide the explanation does not call for a sophisticated approach". The overarching indication from these decisions is that, the duty to explain divergence where it arises, is not a demanding one and that a detailed analysis will not be called for. Further, and importantly given the way this case has been argued (see below), the duty is only to convey to a party, simply and clearly, why it is the F-tT has reached an outcome on the appeal before it which is apparently divergent. In terms of whether that duty, where it has arisen has been complied with, it does not matter that the claimant finds the explanation unpersuasive or disagrees with any reasoning or finding which underpins it. The only issue is whether the explanation is understandable.'

15. I accept and adopt that reasoning which, in my view, properly reflects the law in Northern Ireland.'

13. Inherent in paragraph 15 was an acceptance of the reasoning of Upper Tribunal Judge Wikeley in *SF v SSWP (PIP)* ([2016] UKUT 0481 (AAC)).

14. Applying those principles to the present case, immediately prior to what is now more accurately described as the new claim decision of 1 September 2021, the appellant had an entitlement to the enhanced rate of the daily living component and the standard rate of the mobility component of PIP from and including 17 January 2017. The appeal tribunal was aware of

this entitlement. It is mentioned in the submissions prepared for the appeal tribunal hearing and is referred to in the statement of reasons for the appeal tribunal's decision. Further, it has always been the appellant's case that her circumstances had not changed.

15. In *LO'H-v-Department for Communities (PIP)* I set out the duty on an appeal tribunal to explain divergence between decisions on entitlement to different social security benefits (in that case DLA & PIP) where such deviation arises. Inherent in that reasoning was a conclusion that the duty also arose where, as in the instant case, a prior entitlement to PIP is removed by a subsequent supersession decision – see *SF v SSWP (PIP)* ([2016] UKUT 0481 (AAC)).

16. I return, therefore, to that context and ask whether the statement of reasons for the appeal tribunal's decision in this is adequate to explain to the appellant why she was not now entitled to PIP when for a period immediately prior to the decision which removed her entitlement, she was so entitled. Accepting the further comments made by Mr Killeen about the standard of reasoning, I have concluded that the reasons are not adequate and for this reason find that the decision of the appeal tribunal is in error of law.

Disposal

17. The decision of the appeal tribunal dated 30 April 2021 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.

18. 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 decided 21 January 2021 in which a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 17 November 2020;

    (ii) the Department is directed to provide details of any subsequent claims to Disability Living Allowance 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 Disability Living Allowance 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

22 June 2022