DC-v-Department for Communities (PIP) [2019] NICom 24

Decision No: C8/19-20(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 27 April 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

 Leave to appeal is granted and the appeal is allowed. The decision of the Appeal Tribunal sitting at Craigavon Courthouse on 27 April 2018 under reference CN/7964/17/02D was erroneous in point of law and is set aside. The case is referred to a differently constituted panel of the Appeal Tribunal for re-hearing in accordance with the directions at paragraph 19 below.

**REASONS**

**Introduction**

1. This is an application for permission to appeal against the decision of the Appeal Tribunal sitting at Craigavon Courthouse on 27 April 2018. The Department’s representative, in making a submission on the application, has consented to the Commissioner treating the application as an appeal and determining any question arising on the application as if it arose on appeal. This is in accordance with regulation 11(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999 (No.225). The claimant’s representative from the Law Centre has consented likewise. I consider that the appeal can properly be determined on the papers.

 **The factual background**

2. The Appellant is a lady, now aged 67, who had polio as a child. She had previously had an award of the higher rate of the mobility component of disability living allowance (DLA) together with the middle rate of the DLA care component. She was then invited to make a claim for personal independence payment (PIP). Although she was already 65 when she completed the PIP2 questionnaire, she was eligible to claim the new benefit as she was aged under 65 on 20 June 2016 (see further regulation 4 of the Personal Independence Payment (Transitional Provisions) Regulations (NI) 2016 (No. 227)).

3. As part of the PIP claims process, the Appellant was seen by a Disability Assessor Nurse on 3 August 2017, who prepared a report. On 22 August 2017 the Department’s decision maker reviewed the evidence to hand and decided that the Appellant was not entitled to PIP. This was because the Appellant was scored at only 4 points in respect of each component. As regard daily living, the Appellant was awarded 2 points for both preparing food (activity 1b) and washing & bathing (activity 4b); on the basis that she needed an aid or appliance for each activity. As regard mobility, the Appellant was scored at 4 points for standing and moving more than 50 metres but no more than 200 metres either aided or unaided (activity 2b). The Department notified the decision on 24 August 2017.

4. Following an unsuccessful request for a mandatory reconsideration, the Appellant lodged an appeal on 25 October 2017. She made it clear on the notice of appeal that she was disagreeing with the mobility score. In particular, she explained that “because of the continuing late effects of polio I find any walking uncomfortable, painful and unsafe”. In a written submission for the Appeal Tribunal hearing, the Appellant’s Law Centre representative argued that so far as the daily living component was concerned the Appellant qualified for descriptors 1e (4 points), 4e (3 points) and 6d (2 points). She also argued the mobility descriptor 2e applied (12 points).

 **The Appeal Tribunal decision and grounds of appeal to the Commissioner**

5. The Appeal Tribunal heard her appeal at Craigavon on 27 April 2018. The Appeal Tribunal confirmed the daily living scores for activity 1b and activity 4b, and also added 2 points for activity 6d (dressing and undressing), but this was still insufficient to meet the threshold of 8 points. The Tribunal also confirmed the existing mobility descriptor for activity 2b at 4 points. As a result, the substance of the Department’s decision was confirmed and the appeal disallowed.

6. In the application to the Commissioner, the Appellant’s representative has advanced two grounds of appeal. The first is that the Appeal Tribunal erred in law by failing to give adequate reasons as to why it was satisfied that the Appellant had no issues with performing the activities in issue safely, to an acceptable standard, repeatedly and in a reasonable time without the need for supervision. The second ground is that the Appeal Tribunal erred in law by failing to give an adequate explanation on the mobility component, given that the Appellant had been in receipt of the higher rate mobility component for several years.

7. The Department’s representative, in a detailed submission, does not support either ground of appeal. His argument, in summary, is that the Appeal Tribunal made sufficient findings of fact and provided adequate reasons for its decision, and so did not err in law. The Appellant’s representative, in a further submission, maintains the original two grounds of appeal, but especially with reference to the second ground. I consider it convenient to start with that latter ground of appeal.

 **Ground 2**

8. The central thrust of the second ground of appeal is the submission by the Appellant’s representative that – despite having the EMP report from the previous award of DLA before it – the Appeal Tribunal failed adequately to explain how or why the Appellant’s mobility would have materially changed since that earlier DLA report. In this context the Appellant’s representative relies on the Great Britain decision by Upper Tribunal Judge Wright in *AW v Secretary of State for Work and Pensions [SSWP] (PIP)* [2018] UKUT 76 (AAC) (also known under file reference CPIP/2748/2018). In that case it was held that the tribunal had failed both to make sufficient findings of fact and to explain adequately why the claimant did not meet the criteria for mobility descriptor 2c (the ability to stand and then move a distance of between 20 and 50 metres). In a further submission the Law Centre argues that the Appeal Tribunal failed adequately to deal with the effects of pain and severe discomfort experienced by the Appellant when walking.

9. The Department’s representative, by way of response, makes the perfectly accurate point that the criteria for DLA and PIP are not the same and the former benefit is not an automatic gateway to entitlement to the latter benefit. The Department’s representative also argues that the Appeal Tribunal, when considering the question of entitlement to PIP, had properly considered the EMP report which had underpinned the previous award of DLA. He points out that the Appeal Tribunal specifically noted the EMP’s suggestion that the Appellant might benefit from a rollator to improve her balance and provide support. All in all, he submits that the DLA evidence was weighed in the balance with the other documentary and oral evidence and the Appeal Tribunal reached a sustainable decision which it had adequately explained.

10. Plainly this ground of appeal is at heart an archetypal adequacy of reasons challenge. The classic benchmark for testing adequacy of reasons is the Great Britain decision of Mr Commissioner Howell QC in *R(M) 1/96* at paragraphs 15 and 16). That decision showed that one important function of the requirement to give adequate reasons is to avoid perceptions of unfairness or feelings of injustice. *R(M) 1/96* has also been followed and applied in Northern Ireland – see, for example *SL v Department for Social Development (DLA)* [2012] NICom 277 (Decision No: C59/10-11(DLA)). More recently still, Upper Tribunal Judge Ward in *YM v SSWP (PIP)* [2018] UKUT 16 (AAC) held that there is no rule of law that necessarily requires a difference of outcome to be explained (as between a DLA claim and a PIP claim). Rather, it is for the tribunal in each case to determine in the circumstances of a particular case whether there is such an apparent inconsistency that reasons for it are required. Having considered the typical benchmark for an award of the higher rate mobility component (HRMC) of DLA, Judge Ward further observed as follows:

“15. The distances set by the PIP descriptors are such that a person who can stand and move unaided more than 20 metres but no more than 50 metres will score 8 points, enough for the standard rate of the mobility component. Bearing in mind the benchmark above, a person who had previously qualified for HRMC and whose condition had remained the same might feel some surprise at being told that s/he did not qualify for 8 points for fulfilling mobility descriptor 2c.”

11. More recently still, the approach as set out in *R(M) 1/96* and *YM v SSWP (PIP)* has been endorsed by Upper Tribunal Judge Markus QC in *CH and KN v SSWP (PIP)* [2018] UKUT 303 (AAC). She held as follows:

“81. The principle in *R(M)1/96*, and Judge Ward’s application of it to cases of transfer from one benefit to another, does not place an undue burden on the tribunal. Judge Ward did not say that the tribunal must engage in comparative reasoning for the difference between DLA and PIP awards. The analysis which he said, at [12], was required was as to the potential for inconsistency created by the statutory provisions for the benefits and without which there is no further issue as to the application of R(M)1/96 in that regard. This was in contrast with the over-simplified approaches which he had identified earlier in that paragraph as being insufficient. As he said at [17], deciding whether there is a duty to provide the explanation does not call for a sophisticated approach.”

12. In the present case the Appeal Tribunal briefly summarised the relevant findings from the Disability Assessor’s report (including muscle weakness and pain in her right leg as well as fatigue). However, most of the tribunal’s findings of fact related to the distance that the Appellant could walk and her fear of falling, which the tribunal found was not supported by the evidence. As for the distance she could walk, the tribunal cited the EMP’s assessment that she could walk “several hundred metres” before the onset of severe discomfort. In its reasoning, the Appeal Tribunal acknowledged that the Appellant walked slowly, had an unsteady gait with poor balance and was afraid of falling (which again was found to be “not based on a real risk”). The EMP’s statement about the assistance that a rollator would provide (see above) was also cited. The tribunal concluded that mobility activity 2b applied as “the Appellant can stand and move more than 20 metres but no more than 200 metres with an appropriate aid”.

13. I note that the Appeal Tribunal’s conclusion is not actually in the terms of mobility activity 2b, which is that “the Appellant can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided”. I make no finding in that respect, as I have not had argument specifically on the point. I simply observe that the wording of the relevant passage in the decision does at least give some cause for concern that the Appeal Tribunal may not have applied the proper test. It may, however, simply be a typographical error.

14. The key point to my mind is that the Appellant’s evidence was clear that her mobility had worsened since the date (in September 2009) she had been assessed by the EMP for the purposes of her DLA claim. The fact that she then qualified for the higher rate of the DLA mobility component but did not now meet the test for the standard rate of the PIP mobility component called for more by way of an explanation. The Appeal Tribunal referred to only two findings from the EMP report – about the distance she could walk before the onset of severe discomfort and about the potential assistance a rollator could provide. This rather has the appearance of the EMP report’s findings being ‘cherry-picked’ for factors that supported the tribunal’s decision under the PIP regime.

15. However, the very fact that the EMP found the Appellant could walk “several hundred metres” before the onset of severe discomfort in itself suggested that there must have been other highly significant factors which justified a finding that she was “virtually unable to walk” within the statutory test for HRMC of DLA. Indeed, as the Appellant wrote in her letter seeking leave to appeal, “The question is not how far I can walk but the manner in which I walk”. This is borne out by closer scrutiny of the EMP report. This included the following further findings (from 2009), several of which the Appellant herself cited in her letter seeking leave to appeal:

* “unable to walk any distance alone, needs to be supervised, often holds on to someone for balance”;
* nil function in right foot and substantial impairment of right ankle and lower leg;
* “very severe restriction in function R foot … longstanding foot drop … unable to move 4th/5th toes”;
* “evidence of muscle wasting and [reduced] reflexes R leg”;
* “balance poor when unsupported, tends to sway ++”;
* “the customer reports a severe level of disability which is supported by my clinical findings. This is in keeping with the natural history of polio”;
* “she is at risk of falls without support”;
* “her severe functional restriction is therefore permanent and may deteriorate further in the future”.

16. The Appeal Tribunal made no reference to any of those findings, which in aggregate made sense of the previous decision to award the DLA HRMC, despite the fact that the Appellant was adjudged to be capable of walking several hundred metres before the onset of severe discomfort. Those findings were also consistent with the Appellant’s account that her ability to mobilise had deteriorated over time. In sum, I agree with the Appellant’s representative that the Appeal Tribunal failed to provide an adequate explanation as to why the Appellant qualified for the HRMC of DLA yet did not meet the test for the PIP mobility component. This failure constitutes a failure to provide adequate reasons and a material error of law.

 **Ground 1**

17. In the circumstances I do not need to make a formal ruling on the first ground of appeal. However, insofar as that ground relates to the appropriate assessment under regulations 4(3) and 4(5) of the Personal Independence Payment Regulations (NI) 2016 (No.217), it is plainly arguable that the Appeal Tribunal’s decision involved an error of law. The EMP report from 2009 identified several difficulties with personal care functions. It will be recalled that the Appellant’s representative had argued at the hearing that so far as the daily living component was concerned the Appellant qualified for descriptors 1e (4 points), 4e (3 points) and 6d (2 points). There was certainly support in the EMP report for a finding that 1e and 4e applied (the tribunal accepted 6d in any event).

 **Disposal and directions**

18. In the exercise of the powers conferred on me by Article 15(8)(b) of the Social Security (Northern Ireland) Order 1998 (No.1506), I allow the appeal, set aside the decision appealed against and refer the case to a differently constituted tribunal for determination.

19. I accordingly direct that the issue of whether the claimant satisfies the conditions of entitlement for PIP is to be looked at by way of a complete re-hearing, taking account of the relevant legislation and this decision. Unless otherwise directed, the claimant or her representative must ensure that any further written evidence is filed with the Appeal Tribunal no less than 21 days before the hearing date. The tribunal will need to make full findings of fact on all points that are put in issue by the appeal. If the tribunal rejects the claimant’s evidence, it must provide a sufficient explanation why it has done so and it must in any event give adequate reasons for its conclusions. The tribunal must not take account of circumstances that were not obtaining at the time of the decision under appeal, which was taken on 22 August 2017. However, the tribunal may have regard to subsequent evidence or subsequent events for the purpose of drawing inferences as to the circumstances obtaining at that time: see the decisions of the Commissioner in Great Britain under case references *R (DLA) 2/01* and *R (DLA) 3/01*. The above directions are subject to any further directions which may be given by a salaried judge of the Appeal Tribunal.

20. I should stress that the ultimate decision on the re-hearing of this appeal is entirely a matter for the Appeal Tribunal. The fact that that this appeal to the Commissioner has been allowed on a point of law should not be taken as any indication either way as to the likely outcome of the re-hearing on the facts.

(signed): N J WIKELEY

DEPUTY COMMISSIONER (NI)

17 April 2019