

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 2 July 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Belfast.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I direct that the appeal should be determined by a newly constituted tribunal.
3. I will add that the effect of this decision is to restore the position to that prior to the tribunal's decision. In other words the appellant remains entitled to the daily living component of personal independence payment (PIP) from 18 August 2017 to 3 October 2020. I consider that it is vital for him to seek advice from a suitably qualified adviser in an advice centre, citizens' advice bureau or Law Centre as to what this means and what options are now open to him in terms of the continuance of his appeal.

REASONS

Background

4. The appellant claimed PIP by telephone from the Department for Communities (the Department) from 18 August 2017 on the basis of needs arising from depression, anxiety, post-traumatic stress disorder (PTSD), alcoholism, drug addiction and suicidal thoughts. He was asked to complete a questionnaire to describe the effects of his disability and

returned this to the Department on 1 September 2017. He was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 4 October 2017. A factual report from the appellant's general practitioner (GP) was received by the Department on 9 October 2017. On 31 October 2017 the Department decided that the appellant satisfied the conditions of entitlement for an award of the daily living component of PIP from 18 August 2017 to 3 October 2020, but did not satisfy the conditions of entitlement to the mobility component from and including 18 August 2017. The appellant requested a reconsideration of the decision, and he was notified that the decision had been reconsidered by the Department but not revised. He appealed.

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 2 July 2018 the tribunal disallowed the appeal, removing the award of the daily living component. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 10 September 2018. 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 6 November 2018. On 3 December 2018 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant submits that the tribunal has erred in law on the basis that:
 - (i) it had pre-judged his appeal;
 - (ii) it did not conduct a sufficiently thorough investigation of his mental health problems;
 - (iii) it placed too much weight on his GP's evidence and too little on the report from his consultant psychiatrist.
7. The Department was invited to make observations on the appellant's grounds. Mr Williams of Decision Making Services (DMS) responded on behalf of the Department. Mr Williams submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support 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 including the Department's submission, which contained the PIP2 questionnaire completed by the appellant, a GP factual report and a consultation report from the HCP, along with internal supplementary medical advice. The appellant's medical records were also available to

the tribunal along with a report from a consultant psychiatrist. The appellant attended the hearing and gave oral evidence. The Department was represented by Mr McCaughey. The tribunal observed that the appellant had been awarded 11 daily living points and 4 mobility points by the Department. It advised him that in the light of the evidence it had before it, which indicated that he was working and coping quite well, the tribunal did not consider that his award was consistent with the evidence. It invited him to consider adjourning to take advice about his position. The tribunal gave him time outside the hearing room to reflect on this. He took 10 minutes, but he indicated that he wished to proceed, signing a standard form used by tribunals to record his choice.

9. The tribunal found that the evidence indicated problems with mental health, but not physical health. The appellant was prescribed 100mg quetiapine and underwent Eye Movement Desensitizing and Reprocessing (EMDR) therapy every week. He was working and attended church services regularly, and attended boxing classes three nights a week. He had not self-harmed since 2012. He had not taken alcohol since 2017. The tribunal noted evidence to the effect that the appellant did not have physical problems. He drove himself to work and to church meetings. It found that he had no problems mobilizing. It found on the evidence that he should have no cognitive difficulty with planning a route and that he overcame anxiety to leave his house, going to work and church. It found that no award of points for mobility activities was justified.
10. The tribunal considered daily living activities, observing that any alcohol binges were infrequent and short, that the appellant lived alone, washed, dressed and managed his own affairs without intervention from another. It found that he drove himself to work, to appointments and church meetings. It found that the evidence indicated that no daily living needs descriptors were satisfied, except activity 9 (engaging with other people), where it awarded 2 points under 9(b). It therefore disallowed the appeal.

Relevant legislation

11. 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.
12. 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 claimant who obtains a score of 12 points will be awarded the enhanced rate of that component.

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. The first aspect of the appellant's case is his submission that the tribunal had "made up their minds" and pre-judged his appeal. The circumstances in which this allegation is made are that the tribunal had noted that the appellant had been awarded the daily living component of PIP, while the evidence before the tribunal indicated that he was working and appeared to be coping quite well. In these circumstances, tribunals are required as a matter of procedural fairness to remind appellants that on an appeal their awards can be reduced or removed, as well as increased. The appellant was given an opportunity to take time outside the tribunal hearing room to reflect and was also offered an adjournment in order to seek further advice. In the event, having read and signed a notice confirming that he understood what the tribunal was saying to him, he elected to proceed with the hearing. In maintaining that he wished to proceed, he referred to the views that he ascribed to his psychiatrist on his entitlement to PIP.
17. The tribunal by giving the appellant time to reflect on his position was not prejudging matters. In preparing the appeal, the tribunal would have read the documentary evidence in the papers and provided on the day of hearing. Having read the documentary evidence, it decided to give advance notice to the appellant that there was evidence before it that he would probably need to rebut in order to maintain his existing level of award. There was still a hearing to take place, and if the appellant had satisfactorily dealt with what the tribunal saw as problematic areas then his award would have been maintained. However, the outcome demonstrates that his oral evidence to the tribunal outlining his functional limitations was insufficient to allow that.
18. It appears that the appellant was encouraged by the understanding he had of his consultant psychiatrist's evidence. However, a psychiatrist is

an expert witness who, while medically qualified to report on the appellant's condition, may not be well-versed in the legislative basis of entitlement to particular benefits and the relevant jurisprudence. A tribunal consists of a legal member, a medical member and a disability qualified member. Its members are experienced people trained in, and familiar with, the requirements of social security law. Its preliminary indication to the appellant was a measure aimed at ensuring procedural fairness, in order to avoid the appellant having to deal with unfavourable evidence without advance warning. It gave the appellant every opportunity to reflect on his position and to adjourn for further advice. It would have enabled him to withdraw his appeal and maintain his existing award. He declined the opportunity. I cannot accept that this means that the tribunal was biased against him.

19. The appellant further submits that the tribunal failed in its inquisitorial role by not questioning him sufficiently with regard to exploring his mental health problems. The Department had previously awarded points for the activities of preparing food, managing treatments, washing and bathing, dressing and undressing, mixing with other people and making budgeting decisions. The tribunal asked questions in relation to preparing food, taking nutrition, managing medication, toileting, communicating, reading, and making budgeting decisions. It maintained an award of points for the activity of engaging with other people, but removed all others. Whereas the Department had awarded points for the activities of dressing/undressing and washing/bathing, I observe that the tribunal did not expressly ask the appellant about these activities. It drew inferences from the fact that he was employed and able to get up and go to work. It appears at least arguable that the tribunal did not adequately explore the issues of dressing and washing sufficiently. By not addressing questions to the appellant directly or putting inferences to him for response, it is also arguable that the tribunal has breached the requirements of natural justice. I grant leave to appeal, therefore.
20. The appellant makes a further general submission that the tribunal has erred by preferring the report of his GP to that of his psychiatrist. There were two reports from the psychiatrist before the tribunal. Having considered the report dated 12 April 2018, it seems to me that a further issue arises and that as an inquisitorial tribunal I am obliged to address it.
21. The report of 12 April 2018 was addressed to the appellant's ability to continue to appear as a litigant in person in the Family Court. The psychiatrist opined that the appellant actively manifested 5 of 11 behaviours identified under the heading "vulnerability and incapacity" in the Ministry of Justice document entitled "Litigants in person in private family law cases", and had a past history of a further 2. He considered the appellant to be a vulnerable person within this sense of the term. It was reported that "Although he previously anticipated that he could have completed the role of litigant in person successfully, this is no longer the case in my opinion".

22. The psychiatrist further addressed capacity, which the Ministry of Justice document defined as “Refers to the ability of the litigant to understand the procedural and substantive issues in the case and their capacity to follow the necessary procedures and represent their interests”. Albeit in the context of adversarial family court proceedings, the psychiatrist indicated that there would be a potential impairment in the appellant’s capacity in respect of following the course of the proceedings and giving evidence in his own defence. He opined that the appellant came within the definition of a disabled person for the purposes of the Disability Discrimination Act 1995. He observed reduced ability to concentrate and process information. He recommended some reasonable adjustments, including allocation of an advocate in the proceedings.
23. Family law proceedings are adversarial and potentially involve more stress than tribunal proceedings. Nevertheless, it seems to me that the psychiatrist’s report dated 12 April 2018 merited some consideration and comment by the tribunal. I can see no reference to the report other than the confirmation that it was before the tribunal.
24. In making the decision to address the award of points for daily living, the tribunal gave the appellant time to carefully consider adjourning to take appropriate advice. However, in the tribunal’s words, the appellant “would not be deflected”. It stated further that “it was also apparent that the Appellant had less than a clear understanding of PIP criteria”. It seems to me that the tribunal has put the option to the appellant of withdrawing his appeal, rather than risk the loss of his existing award. As is evident from the appellant’s first ground, it is difficult to present this to an appellant without appearing to have prejudged matters. The tribunal followed the standard procedure in such cases to the letter, it appears to me.
25. Yet, it also seems to me that the tribunal has not given adequate consideration to the psychiatrist’s evidence that was before it. This drew attention to issues with the vulnerability and capacity of the particular appellant. In plain language that report was telling the tribunal that the appellant was not capable of following the proceedings and representing his own interests. This begged the question of whether the particular appellant was capable of addressing the issue arising in proceedings without assistance. If not, I consider that unfairness arises which taints the tribunal’s decision.
26. The tribunal might well have been entitled to form a view that the tribunal proceedings were different to family proceedings and that the psychiatrist’s evidence should be read down accordingly. However, it did not address the report at all. In those circumstances, I must hold that the proceedings were unfair.
27. I consider that I must allow the appeal and set aside the decision of the appeal tribunal.

(signed): O Stockman

Commissioner

21 October 2019