

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 10 August 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference BE/2160/17/02/D.
2. An oral hearing of the application has not been requested.
3. For the reasons I give below, I grant leave to appeal. However, I dismiss the appeal.

REASONS

Background

4. The appellant claimed personal independence payment (PIP) by telephone from the Department for Communities (the Department) from 31 August 2016. His claim was made on the basis of needs arising from high blood pressure, rheumatoid arthritis, depression, psychosis and sleep apnoea. He was asked to complete a questionnaire to describe the effects of his disability and returned this to the Department on 20 September 2016. He was asked to attend a consultation with a healthcare professional (HCP). The HCP consultation report was received by the Department on 21 October 2016. On 22 December 2016 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 31 August 2016. 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 1 August 2017 the tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 28 November 2017. 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 13 February 2018. On 13 March 2018 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant, represented by Ms Boland of Law Centre NI, submitted that the tribunal has erred in law on the basis that:
 - (i) it made insufficient enquiry regarding the appellant's dispute about the accuracy of the HCP report;
 - (ii) it had misdirected itself in relation to Schedule 1, Part 3, Activity 2;
 - (iii) it had misdirected itself in relation to the Daily Living activities;
 - (iv) in light of the appellant's mental illness, it had failed to adopt an approach to enable him to participate effectively in the proceedings, following *Galo v Bombardier*.
7. The Department was invited to make observations on the appellant's grounds. Mr Hinton of Decision Making Services (DMS) responded on behalf of the Department. Mr Hinton submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.
8. The application was stayed for some time pending the decision of a Tribunal of Commissioners in *SA v Department for Communities* [2020] NI Com 38 (*SA v DfC*), which addressed the implications of *Galo v Bombardier* for tribunals. Each of the parties has subsequently made further submissions about the relevance of *SA v DfC* for the present proceedings.

The tribunal's decision

9. 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 consisting of the Department's submission, containing the questionnaire completed by the appellant and a consultation report from the HCP. It had sight of the appellant's general practitioner (GP) records and an AT16 form completed by the GP. No copy of an AT16 is in the papers on the appellant's file, but a letter from his GP dated 9 May 2017 and an ESA85A medical report form prepared for ESA purposes are in the file.

The appellant attended the tribunal hearing and gave oral evidence, represented by Mr Ross. The Department was not represented.

10. The tribunal was told that the appellant disputed the daily living activities 1 (Preparing food), 4 (Washing and bathing), 5 (Managing toilet needs) and 6 (Dressing and undressing) along with mobility activity 2 (Moving around). The tribunal found that the appellant's physical and mental conditions were not sufficiently severe as to prevent him preparing a simple meal, that he was able to wash unaided, that he could attend to toilet needs independently, and that on his own evidence he was able to dress and undress independently.
11. It found that his lifestyle, including attendance at a university course did not suggest that his mental health condition would prevent him having the motivation to dress. It further found that he could stand and move for more than 200 metres most of the time, taking his lifestyle and, particularly, his university attendance into account.
12. It awarded no points and disallowed the appeal.

Relevant legislation

13. 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.
14. 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

15. 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.
16. 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.

17. 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.
18. The appellant advanced four grounds of application.
19. Firstly, he submitted that the tribunal had failed to enquire whether the report of the HCP had been audited by the Department's contractor, noting a 6 day delay between the examination appointment and the completion of the report.
20. Secondly, he submitted that the tribunal had failed to address the appellant's evidence that he was in constant pain.
21. Thirdly, he submitted that the tribunal failed to engage with his evidence in relation to preparing food.
22. Fourthly, he submitted that the tribunal had failed to adopt its procedure to permit him to effectively participate in the proceedings.
23. In response, Mr Hinton reported that he had contacted the Department and that he was informed that the Department's contractor had in fact carried out an audit on the case, but that no changes were made. He submitted that this indicated that the report was prepared in a fair manner and that all information was recorded accurately.
24. He submitted that the tribunal addressed the appellant's evidence regarding his pain and found this not to be credible in light of the level of his treatment and the HCP's evidence.
25. He submitted that the tribunal addressed the activity of "Preparing food" correctly and made rational findings on the appellant's level of motivation to cook.
26. He submitted that the tribunal had adopted a fair process at hearing in accordance with *Galo v Bombardier*.
27. In submissions subsequent to the promulgation of the decision in *SA v DfC*, Mr McCloskey submitted that the appellant had indicated to the tribunal that he had concentration difficulties impacting on his university education and that he is afforded additional time in that context. He reported the appellant's claim that he was given insufficient time to consider the questions posed by the tribunal and an inadequate opportunity to respond, with the result that he eventually walked out of the tribunal in frustration. In consequence, he submitted, the Commissioner may wish to direct the LQM to indicate:

- a) if the panel engaged in advance about any restriction on the appellant's ability to participate;
 - b) if the panel identified any particular concerns about ability to participate, whether they engaged with the appellant in any consideration of how to make the procedures fair;
 - c) what adjustments the panel adopted as a result.
28. Mr Morrison responded further on behalf of the Department. He maintained the submission that the appellant was able to participate fully in the proceedings. He submitted, however, should the Commissioner decide that the tribunal had not given the appellant an opportunity to participate fully, that a direction along the lines indicated by Mr McCloskey should be issued.
29. On the first issue, I note and endorse what Chief Commissioner Mullan had to say in *MP-v-Department for Communities* [2019] NICom 55 concerning the audit process. Whereas the present appeal involved an audit of the HCP report, and whereas the fact of the audit having been performed was not made known to the tribunal, an arguable error of law arises. Therefore I grant leave to appeal on this point.
30. The appellant's submission is that the tribunal erred by failing to enquire into the audit process and that unfairness resulted. However, I am satisfied by the submission of Mr Hinton that no change was made to the HCP report in the course of the audit process, and consequently that no unfairness resulted from the fact that the auditing of the report was not made known to the tribunal. I do not accept that a material error of law results in these circumstances.
31. On the second ground, the basic submission is that, whereas the appellant outlined functional restrictions as a result of knee pain, the tribunal failed to address his evidence. The statement of reasons indicates:
- “[The appellant] had been diagnosed with rheumatoid arthritis, had been admitted to hospital and fluid removed from his knee. We noted that he takes moderate levels of medication and has had no recent specialist follow-up and no physiotherapy. He also did not use aids to walk.”
32. And further,
- “The tribunal took into account [the appellant's] medical history, his typical day and his medications, together with the information provided to and by the HCP assessor.”
33. It is plain that the tribunal considered the appellant's complaint regarding knee pain but addressed it in the context of the wider evidence before it.

It made findings relating to the functional restrictions due to knee pain that are supported by evidence. The evidence did not compel a different conclusion. Therefore I am satisfied that the tribunal did not fail to address the appellant's evidence.

34. The appellant submits that the tribunal failed to give adequate weight to his mental health conditions, and how they affect his daily living activities due to lack of motivation in particular. The tribunal again viewed the claimed functional restrictions in the light of the broader evidence. It said:

“We did not accept that his mental health condition is severe enough to prevent him from preparing and making a simple meal for himself. In particular, we noted that he is able to attend his University course and use a laptop to undertake his work. We found no reason to believe that the HCP report did not accurately reflect what was said at his interview when he accepted that he could prepare a simple meal.”

35. Again, therefore, the tribunal considered the appellant's evidence regarding meal preparation, but addressed it in the context of the wider evidence before it. The evidence did not compel a different conclusion. I am satisfied that the tribunal did not fail to address the appellant's evidence that he needed motivation to prepare a simple meal for himself.
36. The final issue is the submission based around *Galo v Bombardier*. Unlike *SA v DfC*, where the appellant plainly had difficulties entering the hearing room due to anxiety and the hearing proceeded in her absence, the appellant in this case attended the hearing and gave oral evidence. It is submitted that the appellant's difficulties with the hearing process are clear from the record of proceedings.
37. In *SA v DfC*, the Tribunal of Commissioners said:

... *Galo* reminds tribunals of the obligation to act fairly in the particular context of appellants who may have a recognised disability, such as Asperger's syndrome. However, it is not necessary to demonstrate any particular disability for the requirements of fairness to be engaged. They apply equally to all appellants. Where it is clear that a disability is involved which affects the ability of an appellant to participate in a hearing, a heightened level of attention to fairness may be required on the part of a tribunal. However, any appellant who cannot deal with the stress of attending a tribunal hearing, or who has difficulty articulating or presenting evidence, is no less entitled to consideration.

...

Against this background, a key issue is the process of identification of obstacles to effective participation in individual cases. This is a judicial task which is the responsibility of the appeal tribunal. Where appellants

directly indicate that they have disabilities which might be expected to affect their ability to participate in a hearing or issues are otherwise apparent from the tribunal papers, a tribunal would be expected to address these and seek to work around them. The fact that an appellant is represented might create an expectation that these issues should be raised on an appellant's behalf by the representative, but ultimately the responsibility for the fairness of the hearing lies with the tribunal. Having said that, once potential unfairness is identified by a tribunal, it is entitled to address a representative, who knows the appellant, to ascertain what steps might be taken to ameliorate the potential for unfairness.

38. The appellant does not elaborate on the submission that the appellant in this case had difficulties with the hearing process. I observe that when talking about his university course, the appellant explained that he was having trouble with course work, had been registered as a disabled student and had a "mental health tutor" assigned to him who he saw weekly. He explained he lacked concentration and that adjustments were made, such as affording him extra time to do his work. He said "I make mistakes when I am writing as I am dyslexic now".
39. Later, at one point in the hearing, the appellant says, "This is becoming a forensic interview", to which the LQM explained the process of asking questions. However, the hearing proceeded and at the end of the hearing, the appellant's representative says "Everything is covered". The LQM asks "Is everything covered Mr [appellant]?" to which the appellant replies "Yes, Miss". The LQM then records that [the appellant] "left the hearing abruptly".
40. I accept that this speaks to a certain level of irritation with the appeal hearing procedure. However, I do not accept that the sort of difficulties that the appellant described in pursuing a degree course at university can simply be read across into an inquisitorial tribunal hearing of less than one hour's duration. I can understand and accept that the appellant might have difficulty in concentration when writing an essay or analysing text. However, I consider that the task of following direct personal questions and giving oral answers about matters within one's direct knowledge is a completely different thing.
41. In *SA v DfC*, the Tribunal of Commissioners had said,

... What fairness requires in individual cases may sometimes be obvious and sometimes more elusive. However, fairness is a matter of substance as opposed to a clerical exercise. Where the circumstances of a particular application or appeal are such that the procedure adopted by the tribunal calls for explanation, a statement of facts or other matters can be directed under regulation 20(2) of the Commissioners Procedure Regulations. We consider that this provision adequately permits investigation of the procedures adopted at a hearing if a consideration of the fairness of that hearing is required. While there is nothing to prevent a tribunal addressing such questions, and it might be good practice to do

so, we do not accept that there is a general requirement to address its consideration of procedural fairness in a tribunal's record of proceedings or statement of reasons.

42. In light of that statement, Mr McCloskey asks me to direct a statement of facts from the tribunal in this case. However, I do not consider that this is necessary.
43. It appears to me that the tribunal conducted a hearing that is indistinguishable from the vast majority of similar hearings. Whereas the appellant had identified certain difficulties in following his university course, there was nothing to indicate any similar difficulty in attending a tribunal hearing and engaging with direct questions about his health, lifestyle and functional limitations in specific areas. The evidence given in response to the questions was clear and comprehensive. The record demonstrates a certain level of irritation with the tribunal proceedings on the part of the appellant, but not to a level which was untoward, or which would give rise to a concern about the effectiveness of his participation.
44. I am not satisfied that the appellant demonstrates that the proceedings were arguably unfair on the basis of *Galo v Bombardier*.
45. As I am not satisfied that the appellant has made out any of his grounds, I hold that the tribunal has not erred in law and I dismiss the appeal.

(signed): O Stockman

Commissioner

23 September 2020