Decision No: C6/19-20(DLA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

DISABILITY LIVING ALLOWANCE

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 8 June 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 City Hotel Derry, Londonderry on 8 June 2018 under reference LD/2195/18/37D 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 31 below.

REASONS

Introduction

1. This is an application for leave to appeal against the decision of the Appeal Tribunal sitting on 8 June 2018. For the reasons that follow, I both give leave to appeal and allow the appeal itself.

2. 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 regulations 11(3) and 18(1) of the Social Security Commissioners (Procedure) Regulations (NI) 1999 (No.225). The claimant has consented likewise. I consider that the appeal can properly be determined on the papers.

The background

3. Regrettably this case is a 'second time around' before the Commissioner. The Appellant is a boy now aged almost 17. He has epilepsy and

Crohn's Disease. I shall refer to him simply as J to protect his privacy. J previously had an award of the highest rate of the care component of disability living allowance (DLA) together with the lower rate of the DLA mobility component. That DLA award ran from 12 October 2009 (when J was aged almost 7) to 29 October 2016 (when he was nearly 14). On 18 July 2016 his DLA renewal claim was rejected, the Department for Communities (the Department) deciding that he was not entitled to DLA as from 30 October 2016. An appeal tribunal dismissed the appeal following a hearing on 6 February 2017 attended by J's parents.

4. However, on 16 February 2018 Mr Commissioner Stockman allowed J's appeal (see *ML v Department for Communities (DLA)* [2018] NICom 2). The Commissioner set aside the appeal tribunal's decision under Article 15(7) of the Social Security (Northern Ireland) Order 1998 (1998 No.1506), both parties agreeing that the tribunal had erred in law. The Commissioner duly referred the case to a newly constituted tribunal for determination.

5. The re-hearing took place on 8 June 2018. On this occasion (for reasons that will become evident) neither parent attended. The second appeal tribunal came to exactly the same decision as the first tribunal, namely to dismiss the appeal against the refusal to renew the DLA award as from 30 October 2016.

The grounds of appeal to the Commissioner 'second time around'

6. There are six grounds of appeal, namely that the second appeal tribunal erred in law in:

   (1) noting in the record of proceedings that J's mother had not responded to the notice of hearing on 16 May 2018;

   (2) recording that the first tribunal's decision was set aside as "each of the parties accept that the tribunal occurred in law", as this misquoted the Commissioner's decision and made no sense;

   (3) failing to consider the effect of medication on J's behaviour before the recorded deterioration;

   (4) referring to the previous tribunal's decision;

   (5) failing to recognise J's care needs and making incorrect assumptions about his care at night and regarding his sleeping;

   (6) failing to make findings about his participation in PE and his ability to ride a bike.

7. The Department's representative, Mr M Williams, in a detailed submission, does not support any of the grounds 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. However, for the reasons that follow I conclude that Grounds 1 and 3 are made out, meaning that leave should be given and the appeal allowed.

Ground 1

8. The appeal tribunal recorded that there had been no reply to the notice of hearing sent on 16 May 2018. It noted that J's mother had telephoned the Appeals Service on the day before the hearing to say that J's GP records would be delivered to the tribunal but no one would be attending, adding "no reason given". The tribunal decided to proceed. In its reasons, it added that while the tribunal would have preferred to hear oral evidence "it was satisfied that the Appointee's intention not to attend had been made clear and that it was appropriate to proceed in her absence."

9. In the grounds of appeal J's mother states that she replied to the notice of appeal on 28 May 2018, and produces a copy of that letter (just over a printed page in length). This letter stated that "our last oral appeal hearing was far from a pleasant experience …. Our appetite to attend a new oral hearing is unfortunately non-existent". Amongst other matters, the letter referred to their letter of appeal dated 6 June 2017 in relation to the first tribunal's decision and further consultant's letters dated 15 May 2017 and 6 December 2017. It also made submissions about the level of care J needed by way of comparison with his sibling.

10. Mr Williams understandably concedes that he cannot shed any light on either the letter of 28 May 2018 from J's mother or the telephone call. He contends that J's mother had made her intention not to attend the appeal hearing clear and the tribunal was entitled to proceed as it did. Accordingly, he does not support this ground of appeal.

11. Regulation 49(4) of the Social Security (Decisions and Appeals) Regulations (Northern Ireland) 1999 (1999 No.162) provides as follows:

> "(4) If a party to the proceedings to whom notice has been given under paragraph (2) fails to appear at the hearing, the chairman or, in the case of an appeal tribunal which has only one member, that member, may, having regard to all the circumstances including any explanation offered for the absence, proceed with the hearing notwithstanding his absence, or give such directions with a view to the determination of the appeal as he may think proper."

12. The decision under regulation 49(2) on whether to proceed in the absence of a party must therefore be made "having regard to all the circumstances". This decision is necessarily fact-sensitive; see e.g.

Social Security Commissioners' decisions R1/02(IB)(T), *SG v Department for Social Development (DLA)(T)* [2013] NICom 12, *JFR v Department for Social Development (IS)(T)* [2016] NICom 21 and *SG v Department for Communities (DLA)* [2018] NICom 3.

13. In the present case the appeal tribunal, albeit unwittingly, did not have "regard to all the circumstances" as for whatever reason it did not have sight of the letter from J's mother dated 28 May 2018. I do not consider it to be a satisfactory answer to say that J's mother had in any event stated in the letter her intention not to attend the hearing. It is possible that, had they read the letter of 28 May 2018, the tribunal might have considered an adjournment to be appropriate, not least given that this was a re-hearing following a Commissioner's decision to set aside the previous tribunal's decision. The letter of 28 May 2018 also referred to other submissions made on the earlier appeal and more recent medical evidence. The tribunal might, had they seen those references, had decided to adjourn for such documents to be produced. It is no excuse to say that the medical evidence was much more recent, as it is possible that it referred to the past history of e.g. J's experience with different types of medication. There was an inadvertent breach of natural justice in that the appeal tribunal did not consider the letter from J's mother dated 28 May 2018. This may have had an effect on its decision on whether or not to proceed and so amounts to a material error of law.

14. I therefore find Ground 1 to be made out.

Ground 2

15. Ground 2 is that the second tribunal recorded that the first tribunal's decision was set aside as "each of the parties accept that the tribunal occurred in law", as this misquoted the Commissioner's decision and made no sense. I am satisfied this was a simple typographical error. The second tribunal was intending to quote from the Commissioner's observation (at paragraph 11 of his reasons) that "each of the parties accept that the tribunal <u>erred</u> in law" (underling added). A straightforward clerical error of this nature does not amount to an error of law and so this ground of appeal does not succeed.

Ground 3

16. Ground 3 is that the second tribunal erred in law by failing to consider the effect of medication on J's behaviour <u>before</u> the deterioration recorded as having taken effect after the date of the Department's decision (and so outside the tribunal's jurisdiction). Mr Williams opposes this ground of appeal, in effect arguing that there was no other evidence to support such a claim before the second tribunal, and so that tribunal was entitled to reach the decision it did.

17. However, the context here is important. The first tribunal's decision had been set aside on the basis that both parties agreed it involved an error

of law. J's parents plainly had an extensive list of challenges to the conduct and outcome of that first decision (see the Commissioner's decision at paragraph 6(i)-(xiv)). The Department supported the parents' appeal on one point only, namely that the tribunal should have acted more inquisitorially in seeking to establish the impact of medication on J during the relevant period. It followed the Commissioner did not need to explore or indeed rule upon the parents' other and more wide-ranging grounds of appeal. However, there is no question but that the first tribunal's record of proceedings is very short, at least raising a question mark as to whether all the parents' relevant oral evidence had been properly recorded. The Commissioner also noted that the legally qualified member of the first tribunal had given leave to appeal, but without identifying a specific ground of appeal, so suggesting a degree of disquiet on the part of the tribunal about the overall outcome of the appeal (paragraph 10 of the Commissioner's decision).

18. All this suggests that while it was entirely proper for the second tribunal to have before it the record of the first tribunal (see further Ground 4 below), it needed to be treated with some considerable care. The second tribunal, as already noted, was completely unaware of the points made in the letter from J's mother dated 28 May 2018, including the references therein to what may have been other relevant documentary evidence. It was, however, on notice that the Commissioner had found the first tribunal had failed adequately to address the issue of the effects of medication on J. The second tribunal recognised that it "would have preferred to have heard the Appointee's evidence about the effects of the change in medication on the Appellant's behaviour". This was, in and of itself, a strong indicator that the tribunal should have given more thought to the possibility of an adjournment to give the parents an opportunity to attend, notwithstanding their apparently stated intention.

19. These factors all suggest to me that there was an element of unfairness in the way that the crucial question of the impact of the medication was addressed. This is reinforced by closer scrutiny of the second tribunal's reasons and its treatment of the Commissioner's decision. In the first sentence of paragraph 8 of his reasons, Mr Commissioner Stockman summarised the submissions by Ms Adams (for the Department) on the first tribunal's decision as follows:

> "8. Specifically, Ms Adams focussed on the evidence given by the appellant's parents that his behaviours are affected by the medication he takes for epilepsy and were not those of a 'typical teenager' as per the tribunal's finding."

20. The second tribunal, in its own reasons, observed as follows:

> "The first sentence of the said paragraph 8 has caused this tribunal some puzzlement. Reference is made to 'evidence given by the appellant's parents that his

behaviours are affected by the medication he takes for epilepsy'. No such evidence was recorded by the previous tribunal and the present tribunal can only conclude that this is a reference to the contents of the letter dated 5th October 2016 from Dr Corrigan, consultant paediatrician. That sentence also included a reference to 'the tribunal's finding' that such behaviours were those of a 'typical teenager'; the present tribunal could find no such finding on the part of the previous tribunal and noted that the only reference to the term 'typical teenager' appears in paragraph 6(vii) of the Commissioner's decision among the grounds of appeal submitted by the Appellant."

21. There are several difficulties with this passage.

22. First, the tribunal state that no evidence about the medication effects were recorded by the previous tribunal. However, as previously noted, the formal record of proceedings (which runs to just half a page) is extremely limited (and indeed was one of the parents' grounds of appeal 'first time around': see the Commissioner's decision at paragraph 6(xiv)), so the second tribunal should have been alive to the fact the adequacy of the record was very much contested. It could not be taken at face value. There was also (albeit brief) written evidence from J's parents about the effects of medication on J (see e.g. p.25 of the DLA1A Form completed on 28 June 2016).

23. Second, given those difficulties, the second tribunal was not entitled to infer that the only such evidence relied on by the Department in supporting the first appeal to the Commissioner was Dr Corrigan's letter. That inference involved jumping to a conclusion from a very shaky premise.

24. Third, the second tribunal stated it could see no finding by the first tribunal that J's behaviour was that of a 'typical teenager'. However, there was no suggestion that the first tribunal had made such a finding in its statement of reasons. The allegation was that the comment had been made in the course of the oral hearing, albeit not recorded; it thereafter formed one of the grounds of appeal against the first tribunal's decision. Ms Adams for the Department did not doubt that the comment had been made. It is not difficult to see how such a comment, assuming it was made, may have been construed as offensive and belittling and been a factor in the parents' apparent unwillingness to face another hearing. It might also have contributed to the possible sense of unease with the outcome of the first tribunal's decision, resulting in the appeal tribunal's grant of leave to appeal, as identified by the Commissioner (see paragraph 17 above).

25. Taken together, all these factors persuade me that the third ground of appeal is made out. The second tribunal needed to do much more to investigate the issue of the impact of J's medication at the material time.

It also needed to do more to distance itself from the first tribunal's findings and reasons in order to ensure a fair hearing.

Ground 4

26. The fourth ground of appeal is that the second tribunal erred in law in referring to the previous tribunal's decision. J's mother argues that as the Commissioner had set aside the first tribunal's decision, then the second tribunal should never had had sight of the previous decision. She refers to the Commissioner's direction that the case be referred to "a newly constituted tribunal for determination".

27. The view expressed by J's mother is an understandable and commonly held position by litigants. However, as a matter of law it is mistaken. As Lord Phillips of Worth Maltravers CJ explained in *Swash v Secretary of State for the Home Department* [2006] EWCA Civ 1093, in civil litigation "where, on appeal, a case is remitted for a re-hearing by a different judge, it is common place that that judge will have before him the original decision" (at paragraph 17). The Court of Appeal of England and Wales applied the same principle to tribunals (at paragraph 20):

> "It seems to me more satisfactory that, as a general rule, a judge to whom proceedings are transferred in the course of the reconsideration of an appeal should receive the original decision. Even if the findings of fact are invalidated for a reason of law, such as the application of the wrong standard of proof, issues identified in the original decision may well be of assistance to the judge to whom the transfer has been made. In those circumstances the judge must be careful not to be influenced by the discredited findings, but that is a typical requirement of a judge and one well within a judge's capability."

28. It follows that I dismiss the fourth ground of appeal. The second tribunal was entitled to have before it the decision of the first tribunal. What they made of it is another matter, as has already been discussed. But they should see it both to have a picture of the evidence given in earlier proceedings (albeit that was less than satisfactory here) and better to understand where the previous tribunal(s) went wrong as a matter of law, so as to avoid making the same mistake (see *ED v Sunderland City Council (HB and CTB)* [2011] UKUT 177 (AAC) at paragraph 58).

Ground 5 and 6

29. The final two grounds of appeal are that the second tribunal failed to recognise J's care needs and made incorrect assumptions about his care at night and regarding his sleeping and furthermore failed to make findings about his participation in PE and his ability to ride a bike. In the circumstances, given the appeal succeeds on other grounds, I do not

need to make a formal ruling on these last grounds of appeal. I recognise, however, that these were ultimately issues of fact which are for the first-instance tribunal to determine. A simple disagreement over the facts cannot be elevated into an error of law.

Disposal and directions

30. I give leave to appeal. Furthermore, 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.

31. I accordingly direct that the issue of whether the claimant satisfies the conditions of entitlement for DLA 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 his appointee 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 more than three years ago on 18 July 2016. 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 the appeal tribunal.

32. As well as having a copy of both appeal tribunal decisions and Mr Commissioner Stockman's decision, the new appeal tribunal should have before it copies of (i) the letter from Js' parents dated 6 June 2017, seeking leave to appeal against the first tribunal's decision, along with Dr Corrigan's letter dated 15 May 2017 and the revised Individual Healthcare Plan for J dated 26 May 2017; and (ii) DfC's letter dated 4 September 2017, supporting that first appeal to the Commissioner.

33. 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.

34. Finally, I recognise that J's parents may have felt emotionally bruised by the experience of the first tribunal. That said, the nature of the qualifying criteria for DLA are such that sometimes tribunals need to ask difficult and probing questions. As Judge Shelley Lane explained in the GB case of

BK v Secretary of State for Work and Pensions [2009] UKUT 258 (AAC) at paragraph 29:

> "DLA appeals frequently involve medical conditions and personal care needs of an intimate or embarrassing nature. If such conditions or needs are seen to arise, the tribunal must explore them in order to establish entitlement to benefit, whether or not the questions are embarrassing, insensitive or upsetting. A tribunal would be keenly aware that adults from *any* background could well find it embarrassing to tell strangers these things, but it is the tribunal's duty to ask. While tribunals try to minimise distress by being tactful, they cannot always be successful. Questions cannot always be perfectly phrased in the pressured environment of a hearing and attendees may have a variety of preconceptions – or misconceptions - about a hearing which, when combined with the stress of the occasion, lead them to think that a tribunal is biased or unfair in asking questions which are, in fact, legitimate."

35. The conduct of the first tribunal hearing is not a matter that is now before me or on which I can make any findings. I simply make the obvious point that it is very unfortunate that Js' parents decided in effect to boycott the second tribunal hearing. I hope they will understand that the best way for the third tribunal to understand the nature of J's difficulties at the relevant time is to hear first-hand evidence from them.

(signed): N J Wikeley

Deputy Commissioner (NI)

30 October 2019