PR-v-Department for Communities (PIP) [2019] NICom 75

Decision No: C20/18-19(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 13 October 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 13 October 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. 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.

3. 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.

4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his 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

5. On 5 September 2016 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 6 July 2016. Following a request to that effect, and the receipt of additional information in the Department, the decision dated 5 September 2016 was reconsidered on 23 September 2016 but was not changed.

6. The appeal was first listed for oral hearing on 3 April 2017. The appellant was not present but was represented by Mr McCloskey, then of the Citizens Advice organisation. There was a Departmental Presenting Officer present. The appeal was adjourned following an application by Mr McCloskey.

7. The appeal was relisted for oral hearing on 13 October 2017. The appellant was present and was represented by Mr McCloskey by then of the Law Centre (Northern Ireland). There was no Departmental Presenting Officer present. The appeal tribunal allowed the appeal in part making an award of entitlement to the standard rate of the daily living component of PIP from 6 July 2016 to 5 July 2018 but disallowing entitlement to the mobility component from and including 6 July 2016.

8. On 13 March 2018 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 22 March 2018 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

9. On 27 April 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 23 May 2018 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 15 June 2018, Mr Williams, for DMS, supported the application on three of the grounds submitted on behalf of the appellant while submitting that the error in connection with one of those three grounds was not material. Written observations were shared with the appellant and Mr McCloskey on 15 June 2018. On 16 July 2018 written observations in reply were received from Mr McCloskey which were shared with Mr Williams on 23 July 2018.

10. On 20 August 2018 further correspondence was received from Mr McCloskey in connection with one of the grounds of appeal which was shared with Mr Williams on 5 November 2018. On 5 November 2018 the case became part of my workload. On 22 November 2018 I granted leave to appeal and gave as a reason that certain of the grounds of appeal, as set out in the application for leave to appeal, were arguable. On

the same date I determined that an oral hearing of the appeal would not be required.

11. On 27 February 2019 correspondence was forwarded to Mr McCloskey and Mr Williams informing them that I was dealing with an appeal which raised legal issues which were parallel to those in the instant case and that, as a consequence, I was considering whether the instant case should be 'stayed' pending the resolution of the 'lead' appeal. In e-mail correspondence dated 4 March 2019, Mr McCloskey made a request that the instant case should be heard and determined at the same time as the 'lead' appeal. Mr Williams was advised, on 5 March 2019, that I was minded to accede to Mr McCloskey's request and he was invited to make comments. By way of e-mail correspondence dated 6 March 2019 Mr Williams indicated that he had no objections to this course of action.

Errors of law

12. 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?

13. 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;
>
> (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."

The submissions of the parties

14. In the application for leave to appeal, which was received in the Office of the Social Security Commissioners, Mr McCloskey set out eight grounds of appeal. Two of these were as follows:

> (i) The tribunal failed to provide adequate reasons for the decision not to award points in relation to descriptor 1 of the mobility component. In particular the tribunal's reliance on the ability to drive failed to apply the consideration of the appellant's ability to safely complete the task. The tribunal have failed to address the DA's detection that alcohol was present when the appellant drove to the assessment. The tribunal have failed to address how (the appellant's) alcoholism and regular intoxicated state would impact on his ability to safely and repeatedly follow the route of an unfamiliar journey.
>
> (ii) As the appellant suffered from a variable condition the tribunal failed to address this issue in its decision making. Given the variable impact of the intoxicated state as a result of alcoholism it is unclear if the tribunal have considered if there is any point in the day in which the appellant is unable to complete an activity safely and repeatedly.

15. In response to these two grounds of appeal, Mr Williams made the following submissions:

> 'Regulation 4 of the Personal Independence Payment Regulations (Northern Ireland) 2016 provides for the assessment of a claimant's ability to carry out activities. In particular regulation 4(3) provides that where a claimant's ability to carry out an activity is assessed the claimant is to be assessed as satisfying a descriptor only if the claimant can do so safely, to an acceptable standard, repeatedly and within a reasonable time period. I have noted that the Tribunal specifically stated that in assessing (the appellant's) ability to carry out each of the activities it had regard to the requirements of Regulation 4(3) and that in coming to its decision it took into account (the appellant's) ability to perform all of the activities safely, to an acceptable standard, repeatedly and within a reasonable time frame.
>
> The Tribunal asked (the appellant) what his pattern of drinking was at the hearing. (The appellant) stated that alcohol is a big problem for him and every day he drinks beer and wine. (The appellant) also stated that he is drinking a little less now- he stated a couple of bottles of wine and cans of beer, although it is unclear to over what

time period this consumption is over. In addition, having examined (the appellant's) case papers, I can find no record of what time of the day (the appellant) starts drinking; what level of intoxication he reaches and how this may impact on his ability to function. In the Disability Assessor's report it is recorded that (the appellant) stated that he was drinking one bottle of wine a day and that an odour of alcohol was evident from (the appellant) at the assessment. The ESA113 completed by (the appellant's) GP dated 10/08/16 confirmed (the appellant's) alcohol dependence problems and indicated that he had previously been attending alcohol services in the past but had been discharged in March 2016 as he failed to engage.

In GB decision SD v SSWP (PIP) [2017] UKUT 310 (AAC), Judge Hemingway granted an appellant leave to appeal against the decision of a Tribunal. In paragraph 10, Judge Hemingway considered that;

> *"… the tribunal might have erred, having concluded that the claimant was dependent upon alcohol, in failing to make a clear finding as to whether it regarded alcohol dependency as being a "physical or mental condition" (although I thought it might have been implicit from what it said that it did); in failing to consider whether any intoxication in consequence upon the alcohol dependency led to an inability, without prompting, assistance or supervision, to perform relevant tasks during a day or a part of a day; in failing to consider whether intoxication might lead to an inability to perform relevant tasks safely, to an acceptable standard, repeatedly and within a reasonable time period (see regulation 4(2A) and 4(4) of the Social Security (Personal Independence Payment) Regulations 2013) (the PIP Regulations) and, to put it more fundamentally, in failing to make sufficient findings regarding the impact of the alcohol dependency at all."*

Furthermore in a Panel of Upper Tribunal Judges held in *RJ,G McL and CS v SSWP (PIP) [2017] UKUT 105 (AAC)* held in paragraph 56:

> *" …. In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard*

to the nature and gravity of feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant. The same approach applies to the assessment of a need for supervision."

With this in mind, I have then considered the Tribunal's statement of reasons in respect of the disputed Mobility Activity 1;

"The appellant claimed that he would need help from his sister if he was going to an unfamiliar place and the appellant's representative indicated that the appellant was claiming a restriction in accordance with 11(d). However the Tribunal was not convinced by this. We note that the appellant is driving his car on a reasonably regular basis. He drives to his daughter twice a week and he drives to his sister or his Mums at least twice a week and having considered all the evidence, we believed it was more than twice a week. When the appellant was asked if he was alone in the car he said that he usually had somebody with him. Again we did not find this convincing as we note that the appellant is driving to his sisters or his Mums often to get something to eat.

We also did not find the appellants evidence convincing when he was asked about finding his way around an unfamiliar place. He said that he could not really find his way to Gilford from his present accommodation but we were not convinced that this was correct. We note that in the ESA113 completed by the Appellants General Practitioner. The GP has indicated that the appellant could travel to an Examination Centre by public transport or taxi. Taking all the evidence into account we came to the conclusion that the appellant could plan and follow the route of a journey unaided and was therefore not entitled to any points in this regard.

Accordingly the Tribunal awarded no points for mobility and found that the appellant did not satisfy the conditions of entitlement to an award of the Mobility Component of Personal

Independence Payment from and including 6 July 2016."

The Tribunal was of the opinion that (the appellant) had no limitation with Mobility Activity 1, but in its reasoning it does not appear to have considered the effects of (the appellant's) alcohol problem and any limitation that he may suffer with this descriptor as a consequence of intoxication. Although the conclusion reached by the Tribunal may have been correct, I would contend that it had a duty to further investigate the extent of (the appellant's) alcohol problems, especially in respect of what time he starts drinking typically; the degree of his intoxication during the day and how this may impact on his ability to carry out this activity safely and to an acceptable standard. (The appellant) has indicated that he drives on a fairly regular basis but the available evidence does not clarify if he has been drinking prior to doing so.

I would therefore consider that there is merit to this ground and that the Tribunal may have erred in law by failing to investigate this matter adequately.

…

As I have outlined previously, although the Tribunal did attempt to investigate (the appellant's) alcohol problem, it does not appear to have considered the effects of (the appellant's) alcohol problem and any limitation that he may suffer with this descriptor as a consequence of intoxication. I refer again to Judge Hemingway's ruling in GB decision SD v SSWP (PIP) [2017] UKUT 310 (AAC);

"18. The tribunal did, though, then go wrong in effectively overlooking any possible consequences of the alcohol dependency and any intoxication when assessing whether or not any of the descriptors were satisfied…..Its failure to do so clearly did amount to an error of law and, indeed one which, had it not been made might (I do not say would) have led to a different result. So, the tribunal's decision does have to be set aside."

and;

"21. Of course, it does not follow that merely because a claimant is dependent upon alcohol and therefore has a "mental

condition", that that claimant will be unable to perform any of the various tasks or functions relevant to PIP. As was mentioned in R(DLA) 6/06, for example, there is the concept of the "functioning alcoholic", who might be dependent yet still hold down a job. Such a person might not meet the point scoring requirements under PIP even for a part of any day. Matters will vary from one individual to another and careful fact-finding on the part of the new tribunal will be necessary."

Although it is possible that (the appellant) may be able to carry out the activities that make up Parts 2 and 3 of Schedule 1 of The Personal Independence Payment Regulations (Northern Ireland) 2016, the Tribunal had a duty to consider the impact of (the appellant's) alcohol intake on his ability to carry out these activities safely, to an acceptable standard, repeatedly and within a reasonable timeframe throughout the day. Having examined the Tribunal's statement of reasons, it appears to me that the Tribunal has failed to investigate the impact of (the appellant's) alcohol problem adequately or to demonstrate that it has fully considered how this affects his ability to carry out the activities that determine entitlement to Personal Independence Payment. I therefore would consider that there is merit in the issue of variability that has been raised by Mr McCloskey and that the Tribunal has erred in law.'

Analysis

16. Article 83(1) and (2) of the Welfare Reform (Northern Ireland) Order 2015 ('the 2015 Order'), as amended, provide that:

'83(1) A person is entitled to the daily living component at the standard rate if

(a) the person's ability to carry out daily living activities is limited by the person's physical or mental condition; and

(b) the person meets the required period condition.

(2) A person is entitled to the daily living component at the enhanced rate if

(a) the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition; and

(b) the person meets the required period condition.'

Article 84(1) and (2) of the 2015 order provide that:

'84(1) A person is entitled to the mobility component at the standard rate if

(a) the person is of or over the age prescribed for the purposes of this paragraph;

(b) the person's ability to carry out mobility activities is limited by the person's physical or mental condition; and

(c) the person meets the required period condition.

(2) A person is entitled to the mobility component at the enhanced rate if

(a) the person is of or over the age prescribed for the purposes of this paragraph;

(b) the person's ability to carry out mobility activities is severely limited by the person's physical or mental condition; and

(c) the person meets the required period condition.'

17. The 'daily living activities' mentioned in article 83(1) and (2) and the 'mobility activities' mentioned in article 84(1) and (2) are defined by Parts 2 and 3 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016, as amended, ('the 2016 Regulations), in a series of Activities and Descriptors. In summary, for the purposes of entitlement to either component of PIP, a claimant's ability to carry out daily living or mobility activities, described in the Activities and Descriptors in Parts 2 and 3 of Schedule 1 to the 2016 Regulations must be limited by their physical or mental condition. Whether the claimant is (i) entitled to either component of PIP and (ii) at what rate is dependent on the degree of their limitation, arising from their physical or mental condition, as measured by reaching scoring thresholds set out in regulations 5 and 6 of the 2019 Regulations.

18. The 'physical or mental condition' requirement is present in the legislative requirements for entitlement to other social security benefits including Disability Living Allowance ('DLA'). The lead case is *R(DLA) 3/06*, a decision of what was then a Tribunal of Commissioners in Great Britain. The Tribunal held that for the purposes of section 72(1) and section 73(1)(d) of the Social Security Contributions and Benefits Act 1992, which imposed a requirement for the claimant to DLA to be "so severely disabled physically or mentally" that certain consequences follow:

> (i) conceptually and in ordinary language "disability" is distinct from "medical condition" and is entirely concerned with a deficiency in functional ability, ie the physical and mental power to do things (paragraph 35);
>
> (ii) the provisions of sections 72 and 73(1)(d) cannot require that "so severely disabled" means "having a serious medical condition" since otherwise they could not achieve their purpose of correlating entitlement to care needs (paragraph 36);
>
> (iii) if there had been an intention to require proof of a diagnosed or diagnosable medical condition, then the provisions could have made this clear, as they do in other benefit contexts (paragraph 37);
>
> (iv) for the relevant provisions to apply, the claimant must lack the physical or mental power to perform or control the relevant function and where it is not in the claimant's power to avoid certain behaviour he will be "disabled" within the terms of sections 72 and 73(1)(d) (paragraphs 38 to 39);
>
> (v) it is clearly apparent from the language of the provisions itself that the severity of the disability is to be measured solely by reference to the prescribed consequences, and that there is no room for any free-standing test of severity (paragraph 41).

19. The decision of the Tribunal of Commissioners in Great Britain in *R(DLA)3/06* has been approved of and adopted in Northern Ireland – see, for example, *C9/07-08(DLA)*.

20. The approach taken in Great Britain in *R(DLA)6/06* was approved in that jurisdiction in connection with sections 78 and 79 of the Welfare Reform Act 2012 ('the 2012 Act') and the Schedule to the Social Security (Personal Independence Regulations) 2013('the 2013 Regulations'), the equivalent to articles 83 and 84 of the 2015 Order and Schedule 1 to the 2016 Regulations, in *MR v SSWP (PIP)* ([2017] UKUT 0086 (AAC) (*'MR'*)). I accept and adopt the analysis in *MR* and agree that it properly reflects the law in Northern Ireland.

21. Turning to claims to DLA based on alcohol dependency, the lead case is *R(DLA)6/06*, a decision of what was then a Tribunal of Commissioners in Great Britain. The Tribunal held that:

> (i) physical symptoms or manifestations flowing from alcohol dependence alone do not result from an identifiable physical cause and in the light of Harrison and CDLA/2879/2004 (now reported as R(DLA)4/06), it followed that a claimant is not entitled to higher rate mobility component if the only disability on which his claim is based flows from only such a cause (paragraph 19);
>
> (ii) if a separate medical condition arises from the excessive consumption of alcohol, then any disabling manifestations of such a condition can be taken into account in assessing entitlement to the care component and the lower rate of the mobility component of DLA, whether or not the ingestion is related to alcohol dependence (paragraphs 21 to 22);
>
> (iii) the transient and immediate effects consequent upon a person choosing to consume too much alcohol are not to be taken into account in determining entitlement to DLA because a claimant does not require the help contemplated by the legislation if he or she can reasonably be expected to avoid the need for attention or supervision by controlling the consumption of alcohol (paragraphs 23 to 25);
>
> (iv) alcohol dependency is a medical condition, not a disability, but there is a direct causal link between dependence on alcohol and intoxication (paragraphs 28 to 30);
>
> (v) the diagnostic criteria for dependence show that it is inappropriate to think in absolute terms of choice or uncontrollable addiction; it is more helpful to think in terms of the degree of self-control that is realistically attainable in the light of all of the circumstances, including the claimant's history and steps that are available to him to address his dependence (paragraphs 32 and 33);
>
> (vi) a person who cannot realistically stop drinking to excess because of a medical condition and cannot function properly as a result can reasonably be said both to be suffering from disablement and to require any attention, supervision or other help contemplated by the legislation that is necessary as a consequence of his drinking and so there is no reason why the effects of

being intoxicated should not be taken into account in determining his entitlement to the care component of DLA (paragraph 33);

(vii) there is also no reason why the possibility of the claimant's taking advantage of professional assistance to control his alcohol consumption should not be taken into account (paragraph 36);

(viii) the tribunal in the instant case was wrong simply to exclude from all consideration the effects of the claimant being drunk (paragraph 43).

22. The decision in *R(DLA)6/06* was approved of and applied in Northern Ireland in paragraph 9 of *C4/06-07(DLA)*.

23. In *JG v SSWP* ([2013] AACR 23] ('*JG*')), a Three-Judge Panel of the Administrative Appeals Chamber of the Upper Tribunal in Great Britain considered the proper approach to a claim for Employment and Support Allowance ('ESA') based on alcohol dependence. The Tribunal concluded that, in section 15A of (and Schedule 1A to) the 2007 Act, Parliament expressly recognised that a person dependent on drugs or alcohol may have limited capability for work because of that dependency and provided support for the conclusion that Parliament intended that alcohol dependency should fall within the phrase "specific disease or bodily or mental disablement". This view was further supported by Section 18 and regulation 157 of the 2008 Regulations. Further, in the absence of contrary evidence, the summary of the expert evidence in *R(DLA) 6/06* could, and should, be adopted by decision-makers and tribunals in ESA cases as representing the mainstream medical view in respect of alcohol dependence.

24. Mr Williams is correct to cite the decision of Upper Tribunal Judge Hemingway in *SD v SSWP (PIP)* ([2017] UKUT 310 (AAC) ('*SD*')). Mr Williams has cited the relevant paragraphs. It is now accepted that the principles set out in *R(DLA) 6/06* apply to decision-making and appeals in cases where there is a claim to PIP on the basis of alcohol dependence – see paragraph 4.235 of Volume I of *Social Security Legislation 2019/20*. I accept and adopt the analysis in *SD* and agree that it properly reflects the law in Northern Ireland.

25. In summary, therefore, the decision in *R(DLA)3/06* is authority for the proper approach to the 'physical or mental condition' requirement in articles 83 and 84 of the 2015 Order and the decision in *R(DLA)6/06* applies to decision-making and appeals in cases where there is a claim to PIP on the basis of alcohol dependence. Bothe decisions are commended to decision-makers in the Department and appeal tribunals.

26. In the instant case, there is no specific reference to the decision in *R(DLA)3/06* or an analysis as to whether the appellant's alcohol

dependence amounted to a physical or mental condition for the purposes of articles 83 and 84 of the 2015 Order. I do not advocate that it is essential that a decision-making authority, including an appeal tribunal, has, in every case, to undertake an assessment as to whether the medical condition underlying the claim to PIP does meet the relevant legislative criteria. I say that because in the majority of cases it will be obvious that the legislative criteria are met. It will, however, be best and safest practice for the appeal tribunal to undertake such an assessment where there is doubt as to whether the legislative criteria are met because, for example, of the nature of the underlying condition. As the authors of Volume 1 of *Social Security Legislation 2019*/20 have observed 'it is not necessary that the physical or mental condition is a specific disease or condition for which there is a medical diagnosis, but only to show that the limited ability has some cause that was either physical or mental'. In the instant case, I am prepared to accept that the appeal tribunal had accepted that the physical or mental condition criterion had been met.

27. What is more problematic, however, is the manner in which the appeal tribunal has addressed the appellant's alcohol dependence in terms of his ability to function and, more significantly, whether it rendered him unable to carry out any of activities relevant to an entitlement to PIP. The appeal tribunal was aware of the appellant's alcohol dependence. It listed 'alcoholism' as one of the medical conditions mentioned by the appellant in his claim form and noted in the report of an examination conducted by a healthcare professional. In the healthcare professional's report, it is noted that the appellant drinks alcohol amounting to one bottle of wine every day and that his sister has to manage his budget, including retaining his bank card, because he would otherwise spend his money on alcohol. The healthcare professional also recorded 'Odour of alcohol present,'

28. As was observed by Mr Williams, the appeal tribunal also adduced evidence from the appellant concerning his alcohol dependence. In the record of proceedings for the appeal tribunal hearing, the following is recorded:

> 'What is you pattern of drinking?
>
> I drink every day beer and wine.
>
> I am drinking a bit less now. I drink a couple of bottles of wine and cans of beer. Counselling has helped.'

29. As Mr Williams has observed there is no further exploration of the degree and extent of alcohol use including, for example, what time of the day the drinking commences, the duration of the drinking, the degree of intoxication during the day and whether the norm is drinking alcohol every day. I accept, of course, that the record of proceedings for an appeal tribunal hearing does not have to be a verbatim account of all that was said and

observed at the hearing. Nonetheless, concerns would be raised if the 'couple of bottles of wine and cans of beer' were being drunk every day. I also accept that further evidence was taken from the appellant concerning the impact of alcohol on his ability to cook and to manage his budget.

30. In the statement of reasons for the appeal tribunal's decision, there is only one specific reference to the appellant's alcohol dependence. This is in connection with the assessment by the appeal tribunal as to whether the appellant satisfied any of the descriptors in activity 10 in Part 2 of the Schedule to the 2016 Regulations. As part of its reasoning, the appeal tribunal stated:

> 'His sister managed his finance to ensure that the appellant was not tempted to use some money to purchase alcohol although we note that the appellant is able to continue to purchase alcohol on an ongoing basis.'

31. In *SD*, Upper Tribunal Judge Hemingway exhorted decision-making authorities, including appeal tribunals to undertake a careful fact-finding exercise in cases where a claim to PIP is based on alcohol dependence. In that case, and as was noted above, he concluded, at paragraph 18, that:

> 'The tribunal did, though, then go wrong in effectively overlooking any possible consequences of the alcohol dependency and any intoxication when assessing whether or not any of the descriptors were satisfied…..Its failure to do so clearly did amount to an error of law and, indeed one which, had it not been made might (I do not say would) have led to a different result. So, the tribunal's decision does have to be set aside.'

32. In the instant appeal, it is not the case that the appeal tribunal did not completely overlook the possible consequences of alcohol dependency and any consequent intoxication when assessing whether or not any of the descriptors were satisfied – see my comments above about activity 10. Further, it is clear that the appeal tribunal was alert to the appellant's problems with alcohol dependence. Nonetheless, and noting that the issue is marginal, I am of the view that the evidence in connection with alcohol dependence was so compelling that further assessment of the consequences of alcohol dependence was required. For that reason, I have concluded that the decision of the appeal tribunal is in error of law and I set aside. I do so with a degree of reluctance given the appeal tribunal's careful and judicious management of the other aspects of the appeal.

33. Having found, for the reasons set out above, that the decision of the appeal tribunal is in error of law, I do not have to consider the other grounds of appeal advanced on behalf of the appellant. I am, however, taking the opportunity to consider the following two grounds:

> ‘Although we accept the tribunal’s powers to proceed with the case and the appellant’s wish to do so, it is submitted that the reasons have insufficiently outlined how the tribunal have addressed the matters of complaint when weighing the evidence.
>
> All parties to the appeal were disadvantaged by DfC and Capita’s failure to address the complaint and provide the requested documents.’

34. Mr McCloskey had prepared a written submission for the appeal tribunal hearing. In that submission, he set out the following:

> ‘(The appellant) was assessed by a trainee disability assessor on 15/08/2016. The content and accuracy of this report is in dispute (see below).
>
> We are informed that a decision was taken on 05/09/2016 that (the appellant) was not entitled to PIP which is the subject of the present appeal.
>
> Multiple complaints have been raised about the standard of the assessment and the failure to provide access to data relating to (the appellant).
>
> …
>
> It has been confirmed that the disability assessor’s report has undergone audit but the parties to the tribunal remain ignorant as to the content of the audit document and potential impact this has had on the reliability of the Capita assessment.
>
> …
>
> Experience has given rise to concerns as to the evidential weight that should be attributed to reports that can be edited and completed days after the face-to-face assessment.’

35. In *MP-v-Department for Communities (PIP)* ([2019] NICom 55 (‘*MP*’)), I noted the following at paragraphs 5 to 9:

> ‘5. The Department for Communities (and its predecessor the Department for Social Development) is responsible for the administration of social security benefits in Northern Ireland. As part of the decision-making process with respect to certain benefits, mainly Employment and Support Allowance (ESA), Industrial Injuries Disablement

Benefit (IIDB), Disability Living Allowance (DLA) and the benefit at issue in the present appeal, PIP, the Department may arrange for the claimant to attend a medical examination, assessment or what is now known as a face to face consultation. Indeed certain of the substantive rules of entitlement to benefits impose a requirement on claimants to attend such assessments.

6. The Department has contracted the assessment process in respect of certain benefits to external providers. In the case of PIP the external provider is Capita. Capita becomes involved after the claim process to PIP has commenced and a claim has been received in the Department. The claimant, as part of the claim process will complete a form ('PIP2') providing details of their specific illness or disability and how it affects them on a day-to-day basis. When received in the Department, the 'PIP2' form is then reviewed by a Capita Disability Assessor who will decide whether an assessment or face-to-face consultation is required. The Law Centre reports that in approximately 85% of cases a face-to-face consultation is recommended. The consultation usually takes place in one of Capita's assessment centres.

7. A report of the consultation is then passed back to the Department for consideration by a decision-maker as part of the decision-making process in respect of the claim. If the decision on the claim is appealed by the claimant, the report of the assessment or face-to-face consultation undertaken by the Capita Disability Assessor is included in the appeal submission which is sent to the Appeals Service (TAS) and is eventually made available to the appeal tribunal.

8. What has now emerged is that the Capita assessment process and individual claimant reports is subject to a review or audit procedure which is described in greater detail below. One unfortunate consequence of a description of a policy or process is that it has made this decision somewhat lengthy. One of the effects of the audit procedure is that a report of an assessment conducted by a Disability Assessor in respect of an individual claimant may be the subject of an audit and amendment before it is returned to the Department. That is what happened in the instant case. I observe, at this stage, that the amendment to the report in the instant case was to the advantage of the appellant, involving the replacement of a non-scoring descriptor with a scoring descriptor. I say that because it is representative that the audit process is not always adverse to the claimant/appellant. Finally, the report which is seen

by the appeal tribunal is the audited and amended version and not the original which is not seen by the appeal tribunal. Once again, that is what happened in this case.

9. This decision assesses the effect of the audit process on the assessment of evidence by an appeal tribunal in appeals involving entitlement to PIP.'

36. After providing a description of the audit process I said the following at paragraphs 51 to 54:

51. There are four identifiable categories of audit processes as follows:

- A contractually-required Capita audit process as part of its internal quality assurance procedures.

- Clinical Governance Reviews (CGRs) also conducted internally by Capita usually generated by complaints although not every case which was subject to a complaint is escalated to such a review.

- An internal Departmental 'Lot-wide' audit process which involves the audit of a controlled random sample from across a 'Lot' area one of which is Northern Ireland.

- Health Assessment Advisory Reports (HAA) which are, primarily, the Department's method of undertaking a quality audit of a provider of services' (such as Capita) output.

52. The internal contractually-required Capita audit process involves a number of different audits including approval related audits for trainees, new entrant audits for recently approved Disability Assessors, rolling audits and targeted audits. Audits conducted internally by Capita as part of its internal audit process are, unless there are extenuating circumstances, carried out while cases are 'live' and before they have been submitted to the Department. Such audits are graded according to specific criteria and are conducted by more experienced Disability Assessors. Audits may identify issues with a specific report which require corrective action by the Disability Assessor before the report is released to the Department. Corrective action usually involves the report being sent back to the original examining Disability Assessor. Corrective action should not involve amendment to the clinical findings or

examination findings section of the report but should be restricted to the 'Opinion' section of that report. Corrective action may be conducted by a different Disability Assessor, other than the examining Disability Assessor, in certain exceptional circumstances.

53. After the case has been submitted to the Department, where it considers that the assessment reports are, as was noted above, not fit for purpose, the reports may be returned to a provider, such as Capita, for 'rework'. The 'PIP Assessment Guide Part Three, Health Professional Performance' envisages that the type of rework action needed will vary on a case-by-case basis. It is anticipated, however, that wherever possible cases should be discussed with the original examining Disability Assessor or referred back to that Disability Assessor for further action to be taken. In some cases it may be necessary for an additional face-to-face consultation to be carried out, either with the original Disability Assessor or a different Disability Assessor.

54. It is possible for an individual claimant's case to be the subject of both the internal contractually-required Capita audit process and the internal Departmental 'Lot-wide' audit process. In such circumstances the audits will take place before the case is submitted to the Department. From the descriptions given above, I cannot see why any such case might not also be subject to a CGR or HAA.'

37. Having reviewed the relevant jurisprudence, I said the following, at paragraph 64:

64. The principles which emerge from the jurisprudence set out above are consistent and unambiguous:

(i) The Department is under a duty to co-operate with the appeal tribunal. To the extract cited by the late Commissioner Williams from the speech of Baroness Hale in *Kerr v Department for Social Development (Northern Ireland)* ('*Kerr*'), I would add the following in paragraphs 62 and 63:

'62. What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of

entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.

63. If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision CIS/5321/1998,

"a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn." The same should apply to information which the department can reasonably be expected to discover for itself.'

(ii) There is a duty on decision-making authorities, including appeal tribunals, to be fair between the Department and the claimant/ appellant. In this respect, the appeal tribunal must ensure an 'equality of arms'.

(iii) The Department is entitled to arrange for or adduce and rely on whatever evidence it wishes. An appeal tribunal must not, however, be misled as to the provenance of particular evidence on which the Department relies.

(iv) An appeal tribunal must be alert to the general circumstances in which the Department may seek clarification of a report of an assessment which has been conducted on its behalf. That requirement is mandated by the fact that the Department has an opportunity to audit and, where it deems it appropriate, amend or alter the report and

that the Department may carry out audits and amendments before that claimant/appellant ever gets to see the report.

(v) It is rare for the contents of a report relied upon by the Department to be the subject of the same robust challenge in the appeal tribunal setting as takes places in the courts, namely, the attendance by the author of the report as an expert witness at the tribunal hearing and the possibility of being subject to cross-examination about the report's findings and conclusions.

(vi) The appeal tribunal ethos is contrary to the formality of witness summons and witness cross-examination and it is not an effective or efficient method of addressing challenges to the contents of reports of assessment relied on by the Department. Nonetheless, the appeal tribunal can test the validity of a challenged report through a rigorous assessment of it, as part of the overall evidence which is before the appeal tribunal and, in particular, using its own medical expertise as part of the evidential assessment process.

(vii) Where, at the appeal tribunal hearing, there is a challenge to the validity of a report of an assessment which is relied on by the Department and which involves an assertion that the report, as originally prepared, has been the subject of audit and/or amendment by the assessment provider, and the appeal tribunal has no additional evidence to confirm or contradict that assertion, then there will usually be a requirement on the appeal tribunal to adjourn to investigate the matter further. Given that the Department has stated (and I say more about this statement below) that the issue of ignorance of audit and/or amendment of an assessment report should not be an issue going forward nor should the provision and availability of all documentation relevant to the audit process where that has taken place.

(viii) The issue of the disclosure of the audit and possible amendment of a report on

> which the Department relies is one of fairness to the appellant. To that extent it may not matter that the disclosure may not make any difference in that the appeal tribunal would not otherwise have relied on the amended report and disallowed the appeal for other reasons.'

38. Finally, I said the following, at paragraphs 70 to 74:

> 70. I take at face value the Department's statement that from the issue of its Bulletin of 6 September 2018 to its decision makers that the Department is now candid in its dealings with appeal tribunals in flagging up whether an assessor's report on which it relies has or has not been audited and where it has been audited and/or amended, supplies to the appeal tribunal copies of all documentation relevant to that process. To that extent, the issue which has arisen in this appeal may eventually dissipate. That does not negate, however, the duty on the appeal tribunal to be careful in its analysis of all that is presented to it. To give an example, the Department has asserted that the audit process should not involve amendments to the clinical findings or examination findings section of the report but should be restricted to the 'Opinion' section of that report. The appeal tribunal should be careful to ensure that that is the case.
>
> 71. As was noted above, the Department has asserted that it began to take action from July 2017 in that '… report iterations were presented in a proforma (with data being keyed into a stencil) and were accompanied by a summary report drafted by a health professional which explained the changes between report iterations.' It is not wholly clear to me whether that additional information, summary report and proforma setting out the changes between report iterations would have made their way into appeal tribunal submissions.
>
> 72. I add that I have been provided by Mr Arthurs with an example of the materials which will be provided in appeal submissions where the audit process has been conducted. The provision of the assessor's report as originally drafted and the amended version following the audit allows the reader to make comparisons and, thereby to identify the relevant changes. The 'screen shots', which represent the detail of the audit process itself are much more problematic. The copies which I have seen are difficult to read in that the font size is, in places, very small and also difficult to comprehend as there is no specific context for

them. I foresee problems for effective comprehension of these materials by individual appellants without representation. Indeed, they may also be challenging for appeal tribunals. I would recommend that the appeal submission should include a summary of the changes which have been made to an assessor's report as part of the audit process to provide the context necessary to understanding the 'screen shot' documentation.

73. Accordingly, it is my view that in all pre-6 September 2018 PIP appeals which remain before appeal tribunals, the appeal tribunal should be alert to the potential for reports of assessments which are before them and which are relied upon by the Department, to have been the subject of the audit and/or amendments process. This does not mandate the adjournment, in general terms, of all such appeals to determine whether audit action has taken place. It may be the case, for example, that the appeal tribunal relies on the contents of the report as it is consistent with other evidence which is before it. Equally, the appeal tribunal may dismiss the weight to be attached to the report because it is contradicted by other evidence available to it. Where, however, there is a direct challenge to the report on the basis of an audit-related amendments or there is a suggestion of such an amendment then the appeal tribunal must apply the principles set out above to deal with that issue. In that regard, an adjournment for the purpose of the provision by the Department of clarification or additional information may, and I emphasise may, be necessary.

74. In appeals in which the Department has relied on the reports of assessments conducted on its behalf by external providers, there are often more general challenges on appeal to aspects of that report. Examples include inaccurate recording of the appellant's statement, cursory approach to an examination, failure to listen to the appellant's evidence and direct challenge to the clinical findings on examination. Appeal tribunals are used to dealing with such challenges and do not require additional guidance on the proper approach to such disputes. To that extent, I emphasise that the principles which are set out in this decision are restricted to challenges related to the derivation of an assessment report and the effect of the audit process on that derivation.'

39. In *MP*, I was satisfied that the decision of the appeal tribunal was in error of law in failing to make further enquiries as to the possibility that the assessment report relied on by the Department had been the subject of an audit and potential amendment. Nonetheless, I also concluded that the

error was not a material one in that that any further enquiries would only have elicited what the appeal tribunal already knew.

40. In the instant case, Mr McCloskey has submitted that the reasons for the appeal tribunal's decision have '… insufficiently outlined how the tribunal have addressed the matters of complaint when weighing the evidence and that 'all parties to the appeal were disadvantaged by DfC and Capita's failure to address the complaint and provide the requested documents.'

41. In the record of proceedings for the appeal tribunal hearing, the following is noted:

> 'There was a discussion with the Representative regarding the outstanding complaint. It was noted that the Representative has now issued a letter to the Northern Ireland Public Service Ombudsman. No reply has been received yet. However, the Representative was clear that his client wished to proceed with the appeal. He is finding the delays stressful and may not return to another appeal hearing if the case is adjourned. In the circumstances the Tribunal decided to proceed with the hearing.'

42. In the statement of reasons for the appeal tribunal's decision, the following is recorded:

> 'The appellant elected to have an oral hearing of his appeal which took place on the 13 October 2017. The appellant was in attendance with his representative Mr Owen McCloskey.
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> …
>
> A face-to-face consultation with the Health Care Professional took place on the 15 August 2016.
>
> …
>
> The appellant was unhappy with the report from the Health Care Professional and on 16 January 2017 his representative lodged a complaint with the Personal Independence Payment Department. This was forwarded to Capita and Capita replied on the 21 February 2017. The appellant was unhappy with the response and raised a further complaint dated 24 March 2017. This was responded to on the 26 June 2017 by Capita. The appellant's representative also raised a freedom of information request on 21 June 2017 and sent a further letter to the Disability and Corporate Services DFC on the 7 July 2017. DFC replied on the 27 July and 1 August 2017 and again on 10 August 2017.

> The appellant remains unhappy with the response and has made a complaint to the Northern Ireland Public Service Ombudsman by way of a letter dated 27 September 2017. At the date of hearing the Complaints to the Ombudsman has not been responded to but the appellant indicated that he wished to proceed with his appeal.
>
> Parallel to the complaints procedure the Appellant also provided further medical information to the DFC and by way of supplementary response the appellant was awarded 2 points in respect of the activity Engaging with Others Face to Face. This was not sufficient to change the decision in the case came on for hearing on 13 October 2017. The Appeal Tribunal is well aware of the appellant's complaints regarding the Health Care Professional report. However, in view of the appellant's indication that he wished to proceed with the hearing, the Tribunal decided to hear the appeal and to give appropriate weight to the Health Care Professional Report bearing in mind the issues which had been raised.
>
> In effect the Tribunal decided to consider the evidence contained in the Health Care Report together with the other medical evidence and the oral evidence of the appellant at the tribunal and reach its own independent decision on whether or not the appellant was entitled to the benefit. We came to the conclusion that much of what the Health Care reported was actually correct and accorded with our own evidence obtained. However, we did not accept the conclusions reached by the Health Care Professional in respect of the appropriate points to be awarded. We felt there was certainly merit in the stance being adopted by the appellant's representative that the points awarded did not occur with the observations recorded by the Health Care Professional.'

43. The appeal tribunal did not have the decision in *MP* before it, as it had not, at that date, been promulgated. I observe, however, that the manner in which the appeal tribunal addressed the submissions made in connection with the weight to be attached to the report of the healthcare professional and whether there was a requirement to adjourn the appeal tribunal hearing to await developments in relation to the complaint which had been made is wholly in keeping with the principles in *MP*. The approach taken by the appeal tribunal in respect of these issues can only be described as exemplary.

44. I also observe that at the outset of the appeal tribunal hearing, Mr McCloskey, when making his submissions in connection with the ongoing complaint, stated that it was the appellant's wish to proceed with the appeal tribunal hearing. It is to the appeal tribunal's credit that it did not proceed

for that reason alone but examined, in a careful and deliberate manner, the other grounds for proceeding and set out, in its statement of reasons, a thorough explanation for its determination to proceed.

Disposal

45. The decision of the appeal tribunal dated 13 October 2017 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.

46. 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 5 September 2016 in which a decision maker of the Department decided that the appellant was not entitled to the either component of PIP from and including 6 July 2016;
>
> (ii) the Department is directed to provide details of any subsequent claims to PIP 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

19 November 2019