GM-v-Department for Communities (PIP) [2022] NICom 24

Decision No: C10/22-23(PIP)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 27 January 2020

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. Having considered the circumstances of the case, I am satisfied that the application can properly be determined without a hearing. In the application for leave to appeal, the appellant's representative stated that he did not wish to have an oral hearing of his application.

2. I grant leave to appeal and proceed to determine all questions arising thereon as though they arose on appeal.

3. The decision of the appeal tribunal dated 27 January 2020 is not in error of law. Accordingly, the appeal to the Social Security Commissioner does not succeed. The decision of the appeal tribunal is confirmed.

Background

4. On 2 July 2019, a decision maker of the Department decided that the appellant was not entitled to Personal Independence Payment (PIP) from and including 1 February 2019. Following a request to that effect and the receipt of additional medical evidence, the decision dated 2 July 2019 was reconsidered on 10 September 2019 but was not changed. An appeal against the decision dated 2 July 2019 was received in the Department on 10 October 2019.

5. The appeal tribunal hearing took place on 27 January 2020. The appellant was present and was represented by Ms Rigney of the Advice Northwest organisation. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental

decision of 2 July 2019. The appeal tribunal did apply did apply descriptors from Part 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations') which the decision maker had not applied. The score for these descriptors was insufficient for an award of entitlement to the daily living component of PIP at the standard rate – see article 83 of the Welfare Reform (Northern Ireland) Order 2015 and regulation 5 of the 2016 Regulations.

6. On 26 January 2021, an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). The appellant was represented in this application by Mr McGuinness. On 25 February 2021, the Legally Qualified Panel Member (LQPM) determined that the application had been received outside of the prescribed time limits for making it, that special reasons existed for extending the relevant time limit and that the application could be accepted. On the same date the LQPM refused the application for leave to appeal.

Proceedings before the Social Security Commissioner

7. On 9 April 2021, a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 15 April 2021 observations on the application were requested from Decision Making Services (DMS). In written observations dated 6 May 2021, Ms Patterson, for DMS, opposed the application for leave to appeal on the grounds identified by Mr McGuinness. I return below another aspect of the written observations. The written observations were shared with the appellant and Mr McGuinness on 18 May 2021.

8. From June 2020 and into 2021 priority had to be given to a large group of cases in the office of the Social Security Commissioners. This has led to a delay in the promulgation of this decision for which apologies are extended to the appellant, Mr McGuinness and the Department.

Errors of law

9. 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?

10. 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');

(ii) failing to give reasons or any adequate reasons for findings on material matters;

(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;

(iv) giving weight to immaterial matters;

(v) making a material misdirection of law on any material matter;

(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 grounds of appeal and the response

11. In the application for leave to appeal, Mr McGuinness set out the following grounds of appeal:

'**Credibility**

1. The Panel has erred in dealing with the Appellant's credibility at the hearing. The panel has stated that it believes that the Appellant exaggerated evidence and was inconsistent. The panel also stated that the Appellant was evasive. (Please see paragraph 15). These are observations and findings made by the panel that have directly impacted the panel's decision and are clearly material.

2. Whilst the point made in **R(H) 9/04** is accepted, that credibility is a matter for the tribunal, observations and conclusion affecting credibility should be put to the Appellant to allow them to have a chance to comment on them. The panel failed to do this and as such, failed to discharge its inquisitorial function.

3. In the case of **ID v SSWP [2015) UKUT 692 (AAC)** the Judge referred to **R(DLA)S/06** which summarised the principles relating to the reliance by tribunals on observations made at hearings. A tribunal was entitled to take relevant and reliable observations into account. However, a failure to give a claimant the opportunity to comment on the

observations may be an error of taw (a breach of the tribunal's inquisitorial function or its duty to ensure a hearing is fair) if the observations helped formulate the tribunal's conclusions.

4. The panel's potentially erroneous global view of the Appellant's credibility has tainted all the panel's finding given that it formed this view on the Appellant's credibility.'

12. In her written observations on the application for leave to appeal, Ms Patterson set out the following submissions in response:

'**1. The tribunal erred in its treatment of (appellant's) credibility at the hearing in failing to put its observations on this to him to allow comment. He submits that failure to do so is a failure of the tribunal to discharge its inquisitorial role. He cites ID v SSWP [2015] UKUT 692 (AAC).**

The case law Mr McGuinness cites, ID v SSWP [2015] UKUT 692 (AAC), refers to a tribunal's obligations to allow a claimant to comment on observations made during a hearing. Observations discussed in 'ID' were to do with how the claimant presented at the hearing – his concentration, communication skills, ability to answer questions without prompting etc. The tribunal in (the appellant's) case have noted no equivalent observations. These observations are a separate consideration to credibility. I would cite reported decision R3/01(IB) (T), …

I would contend that the tribunal met the standard described above. Having read the statement of reasons and the evidence held, I note that the tribunal has given thorough reasons for its conclusions in every activity of the Personal Independence Payment assessment, citing each piece of evidence it considered, assessing (the appellant) under every descriptor within each activity, noting which evidence it preferred and why. It is entitled to place greater weight on medical evidence than on a claimant's oral or written account. Consequently, I do not agree that it erred in law in regards to its treatment of (the appellant's) credibility.

2. The tribunal failed to properly consider (the appellant's) case, making a passing remark that it was 'mindful' of GB Upper Tribunal decision CPIP/3126/2016 (also referred to as SD v SSWP (PIP) [2017] UKUT 310 (AAC) but failing to show that it considered the factors outlined in that decision.

Mr McGuinness states the tribunal made a passing remark about the above decision but there is no reference to the same in the Record of Proceedings or Statement of Reasons. Nonetheless I would like to consider whether the tribunal met the standard set out in 'SD'.

In 'SD', Judge Hemingway discusses how a tribunal should consider the impact of alcohol dependency in regard to the Personal Independence Payment assesment. Paragraph 16 concludes that:

> *'alcohol dependency, if accepted or if established by the evidence, amounts to a "physical or mental condition", specifically a mental one, as the phrase is used at sections 78 and 79 of the Welfare Reform Act 2012. Difficulties caused by alcohol dependency, therefore, may be relevant to the question of whether or not points are to be scored under the daily living and mobility activities and descriptors though it seems to me, in general terms, that it is more likely that the daily living descriptors will have relevance.'*

Judge Hemingway sets aside the decision of the first tier tribunal because, as summarised at paragraph 18:

> *'it overlooked any possible consequence of the claimant's alcohol dependency and any intoxication when assessing whether or not any of the descriptors were satisfied.'*

Paragraph 19 establishes that it is necessary for the tribunal to make

> *'factual findings concerning the severity of the addiction, the frequency and degree of intoxication within each day and the impact upon the ability to perform the PIP functions safely, to an acceptable standard, repeatedly and within a reasonable time period…'*

This decision was endorsed by Commissioner Stockman in PR v Department of Communities (PIP) [2019] 75.

Turning to what the tribunal did in (the appellant's) case, I note the following extracts from the Statement of Reasons:

> (Ms Patterson then set out several extracts from the statement of reasons)
>
> From the above, the tribunal has met the standard of 'SD', having given careful consideration to each contention given by (the appellant) regarding the impact of his alcohol intake on his ability to complete the tasks of the PIP assessment, within the scope of Regulations 3-7. It has accepted that the evidence shows that this amounts to alcohol dependency, a medical condition, and made findings as to the severity of his condition and frequency of intake – for Activity 3 it awarded points in respect of a requirement for supervision 'owing to excessive alcohol intake on a daily basis because of alcohol dependency.' The tribunal also awarded him points for Activity 4 in respect of a tendency to self-neglect due to depression and alcohol intake. Consequently, I do not agree that it has erred in law as contended.'

13. I was the Commissioner in *PR v Department of Communities,* but nothing turns on that.

Analysis

Credibility

14. It is axiomatic that I accept that the assessment of evidence, including the evidence of the appellant, is a matter for the appeal tribunal. In *C14/02-03(DLA)*, Commissioner Brown, at paragraph 11, stated:

> ' … there is no universal rule that a Tribunal must always explain its assessment of credibility. It will usually be enough for a Tribunal to say that it does not believe a witness.'

15. Additionally, in *R3-01(IB)(T)*, a Tribunal of Commissioners, at paragraph 22 repeated what the duty is:

> 'We do not consider that there is any universal obligation on a Tribunal to explain its assessment of credibility. We disagree with CSIB/459/97 in that respect. There may of course be occasions when this is necessary but it is not an absolute rule that this must always be done. If a Tribunal makes clear that it does not believe a claimant's evidence or that it considers him to be exaggerating this will usually be sufficient. The Tribunal is not required to give reasons for its reasons. There may be situations when a further explanation will be required but the only standard is that the reasons should explain the decision. It will, however, normally be a sufficient explanation for rejecting an item of

evidence, including evidence of a party to an appeal, to say that the witness is not believed or is exaggerating.'

16. This reasoning was confirmed in *CIS/4022/2007*. After analysing a series of authorities on the issue of the assessment of credibility, including *R3-01(IB)(T)*, the Deputy Commissioner (as he then was) summarised, at paragraph 52, as follows:

> 'In my assessment the fundamental principles to be derived from these cases and to be applied by tribunals where credibility is in issue may be summarised as follows: (1) there is no formal requirement that a claimant's evidence be corroborated – but, although it is not a prerequisite, corroborative evidence may well reinforce the claimant's evidence; (2) equally, there is no obligation on a tribunal simply to accept a claimant's evidence as credible; (3) the decision on credibility is a decision for the tribunal in the exercise of its judgment, weighing and taking into account all relevant considerations (e.g. the person's reliability, the internal consistency of their account, its consistency with other evidence, its inherent plausibility, etc, whilst bearing in mind that the bare-faced liar may appear wholly consistent and the truthful witness's account may have gaps and discrepancies, not least due to forgetfulness or mental health problems); (4) subject to the requirements of natural justice, there is no obligation on a tribunal to put a finding as to credibility to a party for comment before reaching a decision; (5) having arrived at its decision, there is no universal obligation on tribunals to explain assessments of credibility in every instance; (6) there is, however, an obligation on a tribunal to give adequate reasons for its decision, which may, depending on the circumstances, include a brief explanation as to why a particular piece of evidence has not been accepted. As the Northern Ireland Tribunal of Commissioners explained in R 3/01(IB)(T), ultimately "the only rule is that the reasons for the decision must make the decision comprehensible to a reasonable person reading it".

17. All of these principles have stood the test of time and have been applied consistently by the Social Security Commissioners in Northern Ireland and Great Britain and by the Upper Tribunal.

Observations

18. In *MC-v-Department for Social Development (DLA)* ([2011] NICom 142, C87/10-11(DLA)) ('*MC*'), I said the following, in paragraphs 16 to 18:

> '*Observations during the course of an appeal tribunal hearing*

16. At paragraph 27 of *R3/01(IB)(T)* a Tribunal of Commissioners stated:

> '….we would state that a Tribunal can use its own observations in reaching an assessment of credibility. It is, however, strongly desirable that a Tribunal seek a comment from the parties on specific observations of activity as opposed to a more generalised impression of the witness. Comment on observations can be sought in an uncontroversial manner and it is up to the Tribunal whether or not it accepts any explanation which is given. A Tribunal will not necessarily be in error if it does not seek such an explanation but it is much less likely to err if it does so. It may, of course be in error if the observations raise a fresh issue not already in contention and the Tribunal does not seek comment on them. For example if an Examining Medical Doctor opines that a claimant always has to hold on when rising from a chair and the decision maker so accepts and awards points accordingly and the Tribunal observes the claimant to rise without holding on, it must mention the observations and seek comment. Whether or not it accepts the explanation given is a matter for the Tribunal.'

17. In paragraphs 16 and 17 of *R(DLA)8/06* Commissioner Jacobs stated:

> '16. An observation can only be taken into account if it is **reliable**. The problem with an observation is that it is a limited snapshot on a particular day. It may not give a reliable picture of the claimant's disablement……..
>
> 17. The **significance** of an observation can only be assessed in the context of the evidence as a whole and the evidence may have to include the result of further inquiries into the issues of relevance and reliability…..'
>
> 18. In *C26/10-11(DLA)*, I stated the following, at paragraph 23:

23. The legal principles concerning the extent to which an appeal tribunal may take into account its observations of an appellant at an oral hearing are clear. In addition to those principles set out in *R3/01(IB)(T)* and *R(DLA)8/06* cited by DMS, in *R1/01(IB)(T)*, a Tribunal of Commissioners stated, at paragraph 13:

'… we wish to deal with one point. In paragraphs 21 to 24 of decision *R 4/99 (IB**),*** Mrs Commissioner Brown held that a Tribunal, like any other adjudicating body, is entitled to use all its senses in assessing the evidence before it and may take account of what it sees as well as hears. She referred to decision *CDLA/021/1994* (now reported as *R(DLA)1/95),* in which a Great Britain Commissioner, Mr Commissioner Skinner, said: -

> "… The tribunal are precluded from conducting a walking test or making a medical examination of the claimant. However, it does not appear to me that the tribunal's ocular observation of the claimant can be said to amount to a physical examination, nor can it be said that the claimant has been required to undergo any physical test. It does not seem to me that the tribunal [*which took into account observations made by the members during the hearing*] were in breach of the prohibition contained in the section. I have considered whether the reliance by the members of the tribunal on their own observation of the claimant may be objectionable on other grounds. It seems to me that a tribunal are entitled to have regard to what they see provided that the weight to be

> attached is considered carefully. …"
>
> We agree with those views. In the context of a Tribunal hearing, sight is one of the more important senses. Observing the manner in which a witness gives his or her evidence and how he or she behaves or responds at other times is an important part of the process. Witness A may be wholly convincing while everyone who listens to and observes witness B soon becomes certain that he or she is lying. A Tribunal must, of course, consider its observations carefully and judiciously. The neatly dressed man who has said he is unable to look after himself may be lying. On the other hand, the Tribunal may be seeing the results of extensive efforts by his family or friends to tidy him up for the hearing. Further, a Tribunal which is going to base its decision, or an important part of its decision, on what it has seen should usually put its observations to the claimant and thereby give him an opportunity to comment. It will then be for the Tribunal to accept or reject the comments. Whether or not this is necessary will depend in a large measure on whether the Tribunal's observations raise a new issue or constitute fresh evidence or whether they merely confirm existing evidence.'

20. Once again, these principles have not been doubted. They were endorsed in Great Britain by Upper Tribunal Judge Markus QC in *ID v Secretary of State for Work and Pensions* ([2015] UKUT 0692 (AAC), CPIP/2433/2015).

Alcohol

21. In *PR-v-Department for Communities (PIP)* ([2019] NICom 75, C20/18-19(PIP)), I said the following in paragraphs 21 to 25:

> '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.'

Application of the relevant jurisprudence in the instant case

22. The statement of reasons for the appeal tribunal's decision is to be commended for its precision and detail. It is clear that the appeal tribunal undertook a rigorous and rational assessment of all of the evidence before it. The appeal tribunal gave a sufficient explanation of its assessment of the evidence, explaining why it took the particular view of the evidence which it did. Any conflict in the evidence before the appeal tribunal has been clearly resolved and explained.

23. The appeal tribunal made sufficient findings of fact, relevant to its decision, all of which are wholly sustainable on the evidence, and all of which are supported by relevant evidence. None of the appeal tribunal's findings are irrational, perverse, or immaterial. All issues raised by the appeal, either expressly or apparent from the evidence, were fully examined by the appeal tribunal in conformity with its inquisitorial role.

24. The proceedings of the appeal tribunal were conducted in accordance with the principles of natural justice, and its decision is reflective of an apposite consideration of, and adherence, to such principles.

25. Read as a whole, the statement of reasons for the appeal tribunal's decision provides a detailed explanation of the basis on which the appeal tribunal arrived at its conclusions on the issues before it.

26. Most significantly, I am satisfied that the appeal tribunal has applied all of the principles relating to credibility, observations and alcohol dependency set out above.

27. In connection with credibility it is important to recall that the appeal tribunal did accept certain parts of the appellant's evidence. This led to the appeal tribunal applying descriptors from Part 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 (the 2016 Regulations) which the decision maker had not applied. The score for these descriptors were insufficient, however, for an award of entitlement to the daily living component of PIP at the standard rate – see article 83 of the Welfare Reform (Northern Ireland) Order 2015 and regulation 5 of the 2016 Regulations.

28. With respect to Mr McGuinness he has misunderstood the principles in the case law relating to observations. They are concerned, in the main, with what an appeal Tribunal sees during the course of an appeal tribunal hearing and, if it wishes to rely on what is seen, the extent of its duty to put those ocular observations to the appellant and/or others.

Another issue arising

29. In her written observations, Ms Patterson made the following additional submissions:

> 'I note that under Daily Living Activity 1, Preparing Food, the tribunal has given the following reasoning at paragraph 3.2.1:
>
> > *'The oral evidence is that the Appellant could prepare a meal for himself if he were sitting down, and that he can use the microwave. The Tribunal is satisfied the Appellant's gout would impair standing but that preparation of meals could be facilitated by the Appellant sitting down to peel and chop ingredients.'*
>
> The tribunal has awarded 1(a) – 'can prepare and cook a simple meal unaided'.
>
> The findings quoted above regarding activity 1 indicate the tribunal concluded that gout limits (the appellant's) ability to perform this activity whilst standing, and that sitting down would facilitate his ability to prepare meals. This would suggest that an aid, for example, a perching stool, might be appropriate such that descriptor 1(b) 'needs to use an aid or appliance to be able to either prepare or cook a simple meal' would be applicable. This attracts an award of 2 points.
>
> This would not be sufficient to result in an award of PIP as (the appellant) would still only have 7 points, and the minimum threshold for the standard rate of either

component is 8 points. Therefore, I would contend that the tribunal may have erred in law, but not materially.'

30. I agree that this point is arguable which is why I have granted leave to appeal. I also agree, however, that any error on this ground is not material.

(signed): K Mullan

Chief Commissioner

17 October 2022