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 23 October 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Department for Communities from the decision of an appeal tribunal sitting at Enniskillen.

2. For the reasons I give below, I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The respondent, who had an existing award of disability living allowance (DLA), was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). He made a telephone claim on 20 February 2017. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 6 March 2017. He identified needs arising from a heart attack, diabetes, stomach problems, rheumatoid arthritis, bad kidney function, a split kneecap, high cholesterol and cancer. He was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 10 April 2017. On 13 April 2017 the Department decided that the respondent did not satisfy the conditions of entitlement to PIP from and including 20 February 2017. The respondent requested a reconsideration of the decision, and he was notified that the decision had been reconsidered by the Department but not revised. He appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 23 October 2017 the tribunal disallowed the appeal in respect of mobility activities, but allowed it in respect of daily living activities, awarding the standard rate of the daily living component for a fixed period of three years. The Department requested a statement of reasons for the tribunal's decision and this was issued on 1 March 2018. The Department applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was granted by a determination issued on 17 April 2018. Leave was granted by the LQM on the basis that it may be arguable that the tribunal had erred in law in its interpretation of daily living descriptors 1(b) or 1(e). On 9 May 2018 the Department's appeal was received in the Office of the Social Security Commissioners.

Grounds

5. The Department submitted that the tribunal had erred in law on the basis that it awarded 8 points under activity 1(f), without considering whether to award points under Activity 1(b) or 1(e). In other words, it submitted that the tribunal had erred in law by failing to consider the ability of the respondent to perform the relevant activities with the use of an appropriate aid or appliance or with supervision or assistance.

6. The respondent was invited to make observations on the applicant's grounds. He questioned the delay in granting leave to appeal, made factual submissions in relation to a perching stool and his ability to grip, and indicated that any aids he used were purchased privately without an occupational therapy assessment. He indicated that he opposed the Department's appeal.

7. Mr Hinton of Decision Making Services (DMS) responded on behalf of the Department. He maintained the submission that the tribunal had erred in law as alleged.

The tribunal's decision

8. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, containing the PIP2 questionnaire completed by the respondent and a consultation report from the HCP. It had sight of the respondent's medical records. The respondent attended the hearing and gave oral evidence. The Department was represented at the tribunal hearing by Mr Duffin.

9. The tribunal put aspects of the medical records to the respondent for his comments. It elicited oral evidence regarding his mobility and daily living activities, finding this to be highly credible and not exaggerated. In relation to preparing food it accepted that the respondent should be

awarded 8 points for descriptor 1(f). It accepted that the respondent should be awarded 2 points for descriptor 4(b). It awarded no points for mobility. It found that the respondent was entitled to the standard rate of the daily living component from 17 May 2017 to 16 May 2020.

Relevant legislation

10. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component. These components may be payable to claimants whose ability to carry out daily activities or mobility activities is limited, or severely limited, by their physical or mental condition. The Personal Independence Payment Regulations (NI) 2016 (the 2016 Regulations) set out the detailed requirements for satisfying the above conditions.

11. The 2016 Regulations provide for points to be awarded when a descriptor set out in Schedule 1, Part 2 (daily living activities table) or Schedule 1, Part 3 (mobility activities table) is satisfied. Subject to other conditions of entitlement, in each of the components a claimant who obtains a score of 8 points will be awarded the standard rate of that component, while a clamant who obtains a score of 12 points will be awarded the enhanced rate of that component.

12. A relevant definition appears in regulation 2, namely:

    "aid or appliance"—

    (a) means any device which improves, provides or replaces C's impaired physical or mental function; and

    (b) includes a prosthesis;

13. Regulation 4 provides the framework in which assessment is to be carried out. It provides:

    4.—(1) For the purposes of Article 82(2) and Article 83 or, as the case may be, 84 whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment taking account of relevant medical evidence.

    (2) C's ability to carry out an activity is to be assessed—

        (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or

        (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.

(3) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—

(a) safely;

(b) to an acceptable standard;

(c) repeatedly; and

(d) within a reasonable time period.

(4) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(5) In this regulation—

"reasonable time period" means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity;

"repeatedly" means as often as the activity being assessed is reasonably required to be completed; and

"safely" means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity.

14. The relevant scoring descriptors are set out at paragraph 1 of Part 2 of the Schedule to the 2016 Regulations. This provides:

PART 2
Daily living activities

Activity	Descriptors	Points
1. Preparing food.	a. Can prepare and cook a simple meal unaided.	0
	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	c. Cannot cook a simple meal using a conventional cooker but is able to do so using a microwave.	2
	d. Needs prompting to be able to either prepare or cook a simple meal.	2

e. Needs supervision or assistance to either prepare or cook a simple meal.	4
f. Cannot prepare and cook food.	8

Assessment

15. I held an oral hearing of the appeal. The respondent was unwell and unable to attend, and was not represented. The Department was represented by Mr Hinton. I am grateful to Mr Hinton for his careful submissions and I wish the respondent well with his treatment and recovery.

16. Before considering the substantive grounds of the Department's appeal, I will deal with the respondent's submission that it was unfair that the Department had been granted leave to appeal some five months after the original tribunal decision, when he had been required to submit his appeal within a month.

17. The respondent brought his appeal initially to a tribunal. The time limit for bringing an appeal to a tribunal is one month, under regulation 31 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the 1999 Regulations), as amended. The Department, by contrast, has brought an application for leave to appeal from a tribunal. Such an application is brought under regulation 58 of the 1999 Regulations. It so happens that the relevant time limit for this is also one month, starting from the date of issue of the statement of reasons for the tribunal's decision. The Department had to wait for the tribunal to prepare its statement of reasons before the one month time limit started to run. Therefore the passage of time before it could make the application was outside its control. However, that is not the key issue, it seems to me. The key issue is that, had the respondent lost his appeal, and had he sought to make an application under regulation 58, exactly the same time limit would apply to him. As the time limit under regulation 58 is the same for both a claimant and the Department, I do not accept that any unfairness arises.

18. Turning to the grounds of appeal, the Department's principal submission was that the tribunal had erred in law by failing to consider descriptors 1(b) and 1(e). Mr Hinton referred to 1(b) which envisaged the need for an aid or appliance to be able to prepare or cook a meal, and 1(e) which referred to a need for supervision or assistance to prepare or cook a meal. He submitted that the use of aids was relevant in the particular case on the evidence before the tribunal, and that the potential for the use of aids meant that the lower level of award should have been made.

19. The gist of the Department's argument was that the tribunal erred by making a finding that the respondent satisfied descriptor 1(f) because it had apparently overlooked or failed to apply regulation 4(2). Alternatively

it had not adequately explained its reasoning for applying the particular descriptor in the light of the relevance of aids and appliances.

20. The requirement of 4(2) is that the appellant's ability to carry out an activity is to be assessed—

    (a) on the basis of the claimant's ability whilst wearing or using any aid or appliance which the claimant normally wears or uses; or

    (b) as if the claimant were wearing or using any aid or appliance which the claimant could reasonably be expected to wear or use.

21. In addition to that general requirement, the activity in issue in this case makes specific provision for the use of aids of appliances at 1(b).

22. In the PIP2 questionnaire, the applicant had indicated that he had physical limitations with grip due to arthritis, and that he used soft grip pans and a kettle stand. He indicated that he had a friend/carer who made his main meal every night. He indicated that he could not stand at a cooker or sink for a long time due to pains in his legs and knee. To the HCP he had stated that if the friend/carer was unable to prepare a meal for him, she would leave something to heat up in the microwave. He further indicated that he would struggle to peel vegetables due to poor grip.

23. The HCP found that the applicant had adequate power and pincer grip on a musculoskeletal system examination and observed that the respondent was not on high dosage pain relief. Her opinion was that it was likely that he could prepare a simple meal unaided. Nevertheless, the tribunal found the respondent's oral evidence of limitations to be highly credible and not exaggerated. It accepted the medical evidence which suggested that standing to cook would be very painful for the respondent. It accepted that he used adapted utensils in the kitchen. It found that he fell within the provisions of regulations 4 to 7 of the PIP Regulations and should be awarded 8 points under descriptor 1(f).

24. I put to Mr Hinton that the approach taken by the tribunal was to award the highest descriptor that it found to apply, namely 1(f). Therefore, before considering whether a lower descriptor such as 1(b) or 1(e) applied, I considered that it was necessary to first decide whether the tribunal had made irrational findings in holding that 1(f) applied or whether it had misdirected itself as to the meaning of 1(f) when read together with other relevant provisions, such as regulation 4 and regulation 7. However, a material matter that then arose was how exactly 1(f) should be construed as, although simply expressed, it seemed to me that it was capable of bearing more than one interpretation.

25. Mr Hinton submitted that to be awarded points 1(f), a claimant had to have an inability both to prepare and to cook food. He relied on the

Department's guidance entitled "Advice for Decision Making Guide" at Appendix 3, Chapter P2 in his submissions on the meaning of 1(f). This advises Departmental decision makers that a claimant can only satisfy 1(f) if they can neither prepare nor cook food (even with aids, assistance, supervision or prompting, and that claimants who can prepare food but cannot cook (or vice versa) would not satisfy this descriptor. However, the Department's guidance is not of legally binding authority and I will return to the Department's interpretation of this point below. Before considering the question in detail, I consider the general structure of the activity of Preparing Food.

26. Descriptor 1(a) applies where a person has no difficulty with preparing or cooking a simple meal. It attracts no points. 1(b), (d) and (e) will apply where a claimant cannot either prepare a simple meal or cannot cook a simple meal, but, with intervention in the form of an aid or appliance, prompting or supervision or assistance, can overcome that disability. A need for the use of an aid or appliance, or for prompting, will score 2 points. A need for supervision or assistance will score 4 points.

27. Descriptor 1(c) is slightly different. It refers to the ability to cook in a microwave, without making any express reference to the preparation of food. However, it concerns the ability of a claimant to cook a "simple meal" in a microwave. "Simple meal" is defined in the 2016 Regulations as "a cooked one-course meal for one using fresh ingredients". As this definition of a simple meal requires the use of fresh ingredients, it is clearly not about simply heating a ready meal in the microwave. Descriptor 1(c), while on its face indicating that points will be scored only for inability to use a conventional cooker, therefore presupposes the ability of the claimant to prepare a simple meal. It will not be appropriate to award points under 1(c) where the claimant cannot prepare a simple meal. I am assisted in this conclusion by the decision of Upper Tribunal Judge Gray in *LC v Secretary of State for Work and Pensions* (PIP) [2016] UKUT 150 at paragraph 23. I agree with her analysis.

28. Returning to 1(f), I find myself in some disagreement with the submission of Mr Hinton. The terminology in 1(f) is slightly different from the other descriptors, in that it refers to "food", rather than "a simple meal". The use of the term "cook" nevertheless implies that hot food, as opposed to, say, a sandwich, is envisaged as the outcome. Therefore, I do not see a significant difference between the terms "food" and a "simple meal" in this context.

29. Where I disagree with Mr Hinton is in the precise construction of descriptor 1(f). He submits that "cannot prepare and cook food" means cannot prepare food <u>and</u> cannot cook food. I consider that on a simple linguistic analysis, "cannot prepare and cook food" means cannot prepare food <u>or</u> cannot cook food. I consider that, in order to achieve the result advanced by Mr Hinton, the relevant wording would have to read, "cannot either prepare or cook food".

30. On a purely logical reading, where the conjunction of “can prepare” and “can cook” is rendered negative, the result is the disjunction of “cannot prepare” or “cannot cook”. However, as social security law has no close connection to logic, I look instead to what I understand as the purpose of the activity of “Preparing food”. It seems to me that the descriptors within the activity gauge the level of a claimant’s ability to prepare and to cook a simple meal or, in 1(f), food. There are two stages in the process of making a simple meal, but only one outcome. In order to make a simple meal, or food generally, a claimant has to be able to both prepare and cook. If a claimant is unable to carry out one of the two stages, there will be no simple meal as an outcome.

31. Each of the descriptors from 1(b) to 1(e) leads to an award of points for inability either to prepare or to cook without using an aid or appliance, being prompted, or having supervision or assistance. The focus there is overcoming the difficulty with preparing or cooking a simple meal. Thus, a claimant who needs to use an aid to prepare a simple meal, but can then cook it unaided scores 2 points under 1(b). A claimant who can prepare a simple meal unaided, but then needs assistance to cook it, scores 4 points under 1(e).

32. Turning to 1(f), on Mr Hinton’s submission, in order to score 8 points, a claimant would have to be unable both to prepare and to cook food. However, I believe, absurd results can result from this interpretation. For example, there will be individuals whose inability to prepare a simple meal can be overcome by use of an aid or appliance, but not their inability to cook it, and vice versa. On Mr Hinton’s interpretation, such a claimant, who needs to use an aid to prepare a simple meal, but who then cannot cook it (even using an aid or appliance, being prompted, or having supervision or assistance), would score 2 points under 1(b). However, the claimant in the example in the paragraph above, who can produce a simple meal with assistance, would score 4 points. I find it odd that a claimant who cannot produce a simple meal with appropriate intervention would score fewer points than one who can.

33. In reality, the functional disability that prevents an individual from either preparing or cooking food is likely to be of a similar character and degree. Therefore, it is likely that interventions of a similar nature may well overcome problems with both preparing and cooking a simple meal. Cases where a claimant’s problems preparing a simple meal may be overcome by a 1(b),(d) or (e) intervention, but not his or her problems cooking, are likely to be rare. However, that does not mean that such cases will not arise. It appears to me consistent, not just with a literal reading of the descriptor, but also with the general structure of activity 1, that a claimant who cannot overcome functional disability in order to either prepare or cook food, would be awarded 8 points. I can see no added value to the narrower interpretation advanced by Mr Hinton, if the context is one of producing a simple meal. In order to avoid the absurdity which could otherwise result, I consider it necessary to construe 1(f) as meaning cannot prepare food <u>or</u> cannot cook food.

34. As indicated, Mr Hinton relies upon the Departmental guidance referred to above. This states that:

> "Descriptor 1f measures the ability to prepare and cook food. A claimant can only satisfy 1f if they can neither prepare nor cook food (even with aids, assistance, supervision or prompting). Claimants who can prepare food but cannot cook it (or vice versa) would not satisfy this descriptor".

35. The guidance refers to a decision of the Upper Tribunal Judge Lunney, CSPIP/60/2016. For the reasons I have given above, I find myself in respectful disagreement with the Upper Tribunal Judge, who takes a different interpretation of 1(f) at paragraph 5 of his decision. I observe that Upper Tribunal Judge Mesher made relevant comments at paragraph 7 in *AI v Secretary of State for Work and Pensions* (PIP) [2016] UKUT 322. From these, I believe that Judge Mesher may have adopted the same interpretation of 1(f) as I do. However, he did not need to decide this particular issue and his remarks are *obiter*. In any event, I find Judge Mesher's comments somewhat ambiguous and therefore I do not seek to draw support from them.

36. I consider that the interpretation that I place on 1(f) is material to the approach I must take to determining this appeal. As noted above, one route for the Department to succeed in its appeal is to establish that the tribunal has made irrational findings on the evidence such that its conclusion that descriptor 1(f) applies is unsustainable. The other route is to show that the tribunal has otherwise misdirected itself as to the correct law.

37. On the question of irrationality, my interpretation of 1(f) is material to the question that the tribunal needed to decide, and therefore what is needed to demonstrate an error of law. If Mr Hinton is correct in his interpretation, then both limbs of 1(f) must be satisfied in order to award points. For the Department to succeed on this ground, it would be enough to demonstrate that irrational findings were made about one limb - either the applicant's inability to prepare food or his ability to cook food. On my interpretation, then either limb of 1(f) must have been satisfied in order for the tribunal to award points. In order to succeed in the appeal on that interpretation, and to establish that the tribunal had materially erred in law on this ground, Mr Hinton would need to demonstrate that irrational findings were made by the tribunal in relation to both the preparation and the cooking limbs when awarding points under 1(f).

38. In relation to preparation of food, the tribunal accepted that the respondent would have poor grip and would struggle to peel vegetables. It noted that he complained of hand pain on writing. The tribunal further accepted that he would have difficulty standing and that standing to cook would be very painful for him. It found that the evidence suggested that

he used adapted utensils and a special kettle to aid safe pouring. The tribunal recorded the respondent's statement in the PIP2 questionnaire that he uses an aid or appliance to prepare of cook a simple meal and that he needs assistance from another person to prepare and cook a simple meal.

39. A finding that the respondent satisfies descriptor 1(f) equates to finding that he cannot prepare food, even with intervention in the form of an aid or appliance, prompting or supervision or assistance, or cannot cook food, even with intervention in the form of an aid or appliance, prompting or supervision or assistance.

40. Mr Hinton submitted that the tribunal recorded that the respondent used adapted utensils when preparing meals and, therefore, was aware that aids were used, including soft grip pans. He noted that the tribunal accepted that the respondent would have difficulty standing, but omitted consideration of the potential use of an aid such as a perching stool. Mr Hinton, submitted that an award of points for descriptor 1(f) would only be appropriate where the tribunal could not rationally make a finding that a lower descriptor applied. He submitted that the tribunal had made irrational findings in relation to both preparing and cooking a simple meal.

41. Alternatively, he submitted, the tribunal had erred by overlooking the application of regulation 4(2)(b), particularly in relation to the potential use of a perching stool, and thereby misdirected itself as to the relevant law. On this question, the respondent has contended that such an option was precluded because of his hand problems that prevented him from moving a perching stool. It may well be that for practical reasons a perching stool might not be a reasonable option, but I consider that the option – and whether it was practicable or not - required exploration by the tribunal.

42. I accept that there is force in the submissions of Mr Hinton. While we differ on the precise interpretation of descriptor 1(f), on the evidence regarding the respondent, it does appear that he actually used relevant aids and appliances to prepare food. It also appears from the evidence that he received direct assistance in preparing food, as he had a friend/carer who did this for him. Assistance is not an appropriate description of a situation where someone takes over the entire process of preparation or cooking a simple meal. I agree with the observations of Judge Jacobs in *Secretary of State for Work and Pensions v GM* [2017] UKUT 268 at paragraph 12. However, a claimant would require to be very severely disabled indeed before it could be said that he or she could not benefit from assistance at all.

43. It is implicit from the tribunal's decision that it found that the applicant could not prepare food at all, even with an aid or with assistance. The tribunal found that the applicant had problems with his grip, and concluded that he would struggle to peel vegetables. However, in the light of the possibility of assistance in the form of physical intervention, it

appears to me that this was not a conclusion that was reasonably open to the tribunal.

44. It also appears that the respondent could have benefitted from an aid or appliance in order to cook food. In particular Mr Hinton submits that he could reasonably benefit from the use of an aid, such as a perching stool, to overcome his difficulty with standing to cook. His disability at the relevant time did not appear to be so severe as to render intervention such assistance ineffective. The respondent disputes his ability to benefit from a perching stool. That matter was not addressed at the tribunal hearing. If it had considered the question, I cannot say whether the tribunal would have made a reasonable decision in holding that the applicant could not cook. However, I conclude that the tribunal has erred in law for failing to address the question of whether aids could reasonably be expected to be used by the respondent in order to be able to carry out the tasks necessary to cook.

45. It follows that I must set aside the decision of the appeal tribunal.

46. I am aware that the respondent is not in good health at present and that it may be difficult for him to have input to a newly constituted tribunal. However, I consider that I cannot make the decision the tribunal should have made, as specific evidence on the feasibility of using particular aids is required of the respondent, and the input of specialist disability qualified and medically qualified member is desirable.

47. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

17 April 2019