

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 15 September 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. **This appeal by the claimant succeeds.**
2. I grant leave to appeal, and I set aside the decision of the First-tier Tribunal made on 15 September 2017 under reference BE/3616/17/02/D.
3. I refer the matter to a completely differently constituted Appeal Tribunal for a fresh hearing and decision in accordance with the directions given below.

Case Management Directions

4. These directions may be supplemented by a Tribunal Chairman giving listing and case management directions. In view of the age of this matter the case should be referred for listing directions as soon as possible.
5. The case will be an oral hearing listed before a differently constituted panel.
6. The new panel will make its own findings and decision on all relevant matters.

REASONS

The procedural position

7. The appeal below concerned entitlement to a Personal Independence Payment (PIP). The tribunal upheld the decision of the Department that no award was merited; indeed, that no points applied. The appellant wished to challenge that decision through her representative. Leave to appeal to the Commissioner was refused by the Tribunal Chairman, and renewed directly to the Commissioner.
8. The Department did not support the application for leave, however in his helpful submission on behalf of the respondent Department Mr Williams indicated that should the Commissioner decide that the decision was erroneous in law he consented to his observations being treated as observations under regulation 18 (1) of the Social Security Commissioners (Procedure) Regulations (Northern Ireland) 1999. The claimant indicated that she had no further observations to make should I grant leave to appeal. In those circumstances it has been appropriate for me to deal with the leave application and the hearing of the appeal at the same time. An oral hearing has not been sought by either party, and it is appropriate and fair that I deal with the matter on the basis of the papers before me.

Background

9. The claimant, aged 52 at the material time, suffers from bronchitis and mental health problems. Although her account is that walking is difficult for her due to breathlessness, her physical problems have not been such a significant feature in relation to her PIP claim as her mental health problems, which are said to cause her sufficient difficulties that an award of both components is merited.
10. The PIP claim came about as a transfer claim from Disability Living Allowance, which she had received for some seven years, the last award being of the lower rate of the mobility component, and the middle rate of the care component. The criteria for the receipt of PIP are, of course, different; however, there may be an overlap, and there is at least some materiality in this case of that award. This is perhaps the appropriate stage at which to mention that the claimant was also in receipt of Employment and Support Allowance, having been placed in the Support Group.
11. Following her PIP claim made on 20 December 2016, an assessment took place at the claimant's home, by Nurse Miller (at Tab 4). The decision-maker adopted Nurse Miller's opinion that no points were merited.
12. The claimant first applied for a mandatory reconsideration, and when this was refused she appealed to the tribunal, and her representative, Ms Jones of the Mid and East Antrim Citizens Advice Bureau based in Larne, made submissions both in writing, and orally to the tribunal. As I have said the appeal was not successful, and the claimant, through her

representative, lodged this appeal. I am grateful to her for her careful submissions.

The position of the appellant

13. The grounds of appeal before me were threefold.

(i) That the findings as to preparing a meal were flawed because they were based on what were described as inconsistencies in the claimant's evidence, which were described as "unreasonably obtuse and pedantic." Had the tribunal been concerned as to these minor inconsistencies, it could have investigated them by asking further questions. This approach is said to have tainted its overall approach to the claimant's evidence.

(ii) The finding as to credibility based upon the conflict in the evidence of the appellant that she "never goes out" and her acknowledged sortie in the dark (as a passenger in a car her husband was driving) to look for her missing dog was unfair, and, in light of her evidence that she went to various appointments with her husband, was not in fact an inconsistency. Once again, it is argued that the approach of the tribunal to have evidence as a whole was tainted by this error.

(iii) The statement of reasons prepared by the Tribunal Chairman was inadequate as to its findings of fact on material matters. It was deficient in its reasoning for failing to award points under the various activities in contention, and the medical evidence put forward as to the claimant's mental health problems was not reflected in the points awarded.

The position of the respondent

14. The position adopted by Mr Williams for the Department can, I hope with fairness to him, be encapsulated in his argument that the reasons of the tribunal were sufficient, and in particular his reliance on the decision of a Tribunal of Commissioners, R 3/01/(IB) in which it was decided that the tribunal was not under an obligation to explain its assessment of the claimant's credibility, and here in its attempts to do so the tribunal went further than was necessary. The quotation cited is at paragraph 22 of that decision, and I rehearse it here:

"Firstly, 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 the tribunal makes clear that it does not believe the claimant's evidence or that it considers him to be exaggerating this will usually be sufficient. The Tribunal is not required 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."

15. As to the final point, the more general attack on the adequacy of the tribunal's fact-finding, Mr Williams argues that the tribunal having recorded that in making its decision it considered the appeal papers including the GP notes, that was sufficient to indicate that the evidence had been considered, and, following R2/04(DLA) a decision of a tribunal of NI Commissioners, where medical evidence is being rejected or where little weight is placed upon it the provision of adequate reasons indicating the tribunal's assessment of that evidence need only be sufficient to indicate to a reasonable person why the tribunal did not rely upon it. That is to summarise the paragraph which he quotes in full, but I repeat the final line:

"To be adequate, reasons should be of a standard such that a reasonable person, reading them, could understand why the tribunal decided as it did."

My analysis

16. I see the argument of the claimant as going beyond an attack on the sufficiency of reasons that Mr. Williams addresses. What is actually being said is that the approach of the tribunal was unfair, indeed irrational, and that this is shown by the examples of inconsistencies set out in the statement of reasons. I therefore consider the statement on that basis.
17. I will try to explain the format of that document, although this is not easy, given the absence of numbered paragraphs. It begins with some factual observations about the background to the appeal and the appellant's domestic circumstances which seem largely uncontroversial, and it then becomes a résumé of the evidence, including a summary of some points from the claimant's appeal letter, some points in her letter regarding the mandatory reconsideration request, and from the claim form. What are said to be inconsistencies in the written and oral evidence are then stated; in fact, it is said that the claimant *"contradicts herself throughout all of her evidence."*
18. I do not find the so-called inconsistencies convincing to damn the claimant's credibility as the tribunal did, but I am conscious that the

weighing of evidence is a task for the fact-finding tribunal, and I do not base my decision on that. Regrettably, the nit-picking approach of this tribunal to the assessment of the claimant's evidence leaves me with real concern that procedural unfairness has resulted.

19. Firstly, the inconsistencies are inaccurately stated. For example, it is said *"As regards budgeting we are told today that her husband does same but no such difficulties are mentioned in the reconsideration letter or the appeal letter and she told the nurse she could manage her own budgeting."* This précis of her assertions regarding budgeting omits her statement in the original claim form at 12c: *"My husband sort (sic) out my household budget pays bills and plans for the future. I become very stressed and anxious when I have to deal with these things."*
20. It is also the case that the written submission of Ms Jones took issue with the healthcare professional's report, saying *"It is also important to note that the claimant is unhappy with Consultation report provided (TAB 4) and disagrees with many statements made by the Disability Assessor."* The record of proceedings further notes the claimant's representative as saying during the hearing, with reference to a remark she was said to have made to the assessor *"She disagrees with the assessment record."* If what she told the nurse about her ability to budget was not accepted, whilst the claimant's account is inconsistent with that of the healthcare professional, for the tribunal simply to categorise this as the claimant's inconsistency without making a finding as to whether or not that, and the other matters challenged in that report, were likely to have been said by her is an irrational approach to the analysis of evidence. What the tribunal has done is to cite what it says are inconsistencies as the reason that it has accepted the healthcare professional's evidence where it conflicts with the appellant's; however, to use the conclusion as the premise misses out the process of evaluating the evidence.
21. Another material error concerns the apparent expectation that unless matters were mentioned in both the mandatory reconsideration request and the letter of appeal an inconsistency arises that permits wholesale rejection of an appellant's assertions. It cannot be a proper evaluation of the evidential picture as a whole where it is based upon that expectation. Mandatory reconsideration is a statutory right in the exercise of which no reasons need to be given and an appellant will not know that an appeal letter is expected to be set out in exquisite detail because to say something in oral evidence which has not been said in that appeal letter will fatally damage their credibility. For a tribunal to take such an approach is simply wrong.
22. Further, it is hard to understand quite how the tribunal used what it describes as the inconsistencies to cast doubt on the claimant's credibility, given its conclusions in which some difficulties in relation to a number of the daily living activities, motivation preparing food, nutrition, attending to her hygiene, dressing and undressing, socialising and mixing, and requiring supervision in relation to her medication, are

accepted. It is the extent of those difficulties that are not accepted, and, so far as I can ascertain, no reason at all is given for the view that these difficulties happen, contrary to the tenor of the appellant's assertions, "*occasionally-but not most of the time*". The conclusion seems to be plucked from the air.

23. As to the daily living activities which the tribunal finds the claimant would not have difficulty with, the opacity continues. It is said that "*The claimant knows the value of money and could budget if she had to. The tribunal notes that there is no appointee in place in regard to her affairs.*" It is not a requirement in order to have difficulties with the activities of daily living that may be affected by stress or other mental health issues that the claimant's condition is so extreme that an appointee is required to take care of their affairs. If that remark is intended to indicate the extent, or lack of severity of the claimant's mental health problems it is wholly inadequate for that purpose.
24. In relation to mobility activity 1 it is said: "*As regards planning a journey there is no clinical evidence before the tribunal indicating why she could not plan it and follow the route of the journey.*" Where mental health problems other than cognitive difficulties are involved it is hard to know what the tribunal might have expected by way of clinical evidence as to why somebody had difficulties planning a journey. Given the wealth of medical evidence that this claimant has had mental health difficulties (at some level) over many years, as well as the prior award of DLA lower rate mobility, if the tribunal was sceptical as to the extent of the difficulties it needed to give some explanation as to why her contentions were rejected. Frankly, the fact that, having said she only went out of her house to go to appointments, she went out once at night in a car that her husband was driving to look for their missing dog simply cannot be an explanation as to the tribunal's conclusion on this issue.
25. Further, there is an error of fact in the statement of reasons, which, given the very narrow approach of the tribunal to the consistency of the evidence is material here. It appears in the comment on the GPs report of 26 January 2017, where it is said the GP reported that the claimant "*could travel to the consultation centre by public transport or taxi.*" In fact, Dr Beck of the Victoria Surgery indicated the opposite. In answer to the question "*Could your patient travel to a consultation centre by public transport or taxi?*" The doctor ticked the box that said "*no*" (rather than either "*yes*" or "*don't know*").

My conclusion

26. My conclusion has of course been formed by my reading of the statement of reasons. I remind myself of the function of such a document from the judgment of the Court of Appeal of England and Wales in *Bassano v Battista* [2007] EWCA Civ 370 at para 28:

“The duty to give reasons is a function of due process and therefore justice, both at common law and under Article 6 of the Human Rights Convention. Justice will not be done if it is not apparent to the parties why one has lost and the other has won. Fairness requires that the parties, especially the losing party, should be left in no doubt why they have won or lost.”

27. This is little more than to restate the test Mr Williams uses from R2/04(DLA), which I have set out at paragraph 7. This statement of reasons is wholly inadequate for that purpose. In so far as there have been facts found, no evidential basis for them is set out; the way in which the tribunal has exploited quite subtle differences in the written and oral accounts to wholly disregard the claimant’s evidence is irrational, and has tainted its conclusions. The perception of the claimant having had a fair hearing is, regrettably, absent.
28. The decision must be set aside as a result of those matters, and the appeal reheard.
29. I should caution the claimant that the fact she has succeeded in this appeal which is *on point of law* is no indication of the result at the rehearing, where the fresh tribunal will determine the facts and apply the legal tests to them.

(signed): P Gray

Deputy Commissioner (NI)

26 March 2019