

**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 9 October 2018

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Omagh.
2. For the reasons I give below, I grant leave to appeal. Under Article 15(7) of the Social Security (NI) Order 1998 I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

**REASONS**

**Background**

3. The applicant had a previous award of disability living allowance high rate mobility component from 3 October 2005 to 13 March 2018. As his DLA award was due to expire, the applicant was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). He duly made a telephone claim from 24 November 2017 on the basis of needs arising from atrial fibrillation. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and he returned this to the Department on 13 December 2017. He agreed to previous evidence from his DLA claim being considered and a GP factual report dated 29 July 2008 was obtained. He was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 11 January 2018. On 12 February 2018 the Department decided that the applicant did not satisfy

the conditions of entitlement to PIP from and including 24 November 2017. The applicant requested a reconsideration of the decision, and a supplementary advice note was obtained from a medical assessor. The applicant was notified that the decision had been reconsidered by the Department but not revised. He appealed, but appears to have waived his right to an oral hearing of his appeal.

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 the papers on 9 October 2018 the tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 15 March 2019. The applicant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 1 May 2019. On 10 May 2019 the applicant applied to a Social Security Commissioner for leave to appeal.

### **Grounds**

5. The applicant submits that the tribunal has erred in law on the basis that:
  - (i) the tribunal made insufficient findings of fact;
  - (ii) the tribunal made perverse findings of fact;
  - (iii) the tribunal had made a mistake as to material facts and ignored pertinent facts.
6. The Department was invited to make observations on the applicant's grounds. Mr Arthurs of Decision Making Services (DMS) responded on behalf of the Department. Mr Arthurs submitted that the tribunal had erred in law on one of the grounds alleged and additionally on the basis that the tribunal appeared to have engaged with post-decision facts, and indicated that the Department supported the application.
7. The applicant duly responded, concurring with the Department's observation that the tribunal had engaged with facts which post-dated the decision under appeal.

### **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 applicant, a GP factual report relating to DLA dated 29 July 2008, a consultation report from the HCP, a supplementary medical report and a copy of a Capita audit report. The applicant's medical records were also before the tribunal. The applicant had waived his right to an oral hearing of the appeal, which proceeded on the papers in the absence of oral evidence.

9. The tribunal observed that the applicant had previously been awarded DLA high rate mobility component on the basis of atrial fibrillation and recurring gout. It noted that the applicant had stated in his PIP2 questionnaire that he could not walk more than 20 metres, sweats a lot when walking, and that walking exhausted him. It noted, and accepted, the applicant's challenge to the HCP's findings as based on observation of him mobilising 5 metres at most, but indicated that the HCP was not carrying out a walking test. It noted that the applicant was presently working essentially full time as an administrator, that he was able to drive to and from work and currently took no medication for atrial fibrillation, having stopped Warfarin as a result of ulceration.
10. The tribunal noted that the GP records showed that the applicant had worked with chainsaws in 2013, and noted an injury in March 2018 apparently using a wheelbarrow and crowbar. It noted that he had climbed scaffolding in August 2018. It found no medical follow-up regarding atrial fibrillation since 2001. The tribunal made a judgement that the applicant was engaged in quite heavy work and, finding no indication of mobility problems in the medical records, decided that he should not score points for mobilising. It similarly found that he had no difficulties which would attract points for daily living and disallowed the appeal.

### **Relevant legislation**

11. 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.
12. 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 claimant who obtains a score of 12 points will be awarded the enhanced rate of that component.

### **Assessment**

13. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.

14. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
15. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
16. The applicant submitted that the HCP report was inaccurate in that he had told the HCP that he had never used a walking aid.
17. The applicant submitted that the tribunal drew erroneous inferences from the medical records in the context of Dupuytren's Contracture in 2013 where the GP had recorded that he worked with chainsaws. He emphasised that this was expressed by the GP in the past tense and indicated that he had not worked with chainsaws since 1991.
18. The applicant noted that the tribunal referred to him apparently using a wheelbarrow and crowbar in March 2018, in the context of a crush injury to his hand. He explained that he was trying to retrieve his spectacles which had fallen in his garage when the crowbar fell, crushing his hand against a wheelbarrow. He emphasised that Dupuytren's Contracture affected two fingers and a thumb on both his left and right hands, which would prevent him using either a crowbar or a wheelbarrow.
19. He further indicated that the GP entry referring to climbing scaffolding in August 2018 was incorrect. He had stood on a scaffolding bar which was lying on the ground and aggravated an existing condition – Ledderhose Disease – for which he was previously treated at Musgrave Park Hospital. The applicant further submitted that there had been various medical interventions since 2001 due to his atrial fibrillation.
20. For the Department, Mr Arthurs did not accept the applicant's criticism of the HCP report. He did however accept that the tribunal appeared to have drawn unfair inferences by finding that the applicant's work was inconsistent with mobility difficulties.
21. He further observed that, whereas the date on decision was 12 February 2018, the tribunal had referred to medical attendances with the GP in March and August 2018 and had based its assessment of credibility on the entries on those dates. By Article 13(8)(b) of the Social Security (NI) Order 1998, a tribunal is precluded from taking into account circumstances not obtaining at the date of the decision under appeal. As the events of March and August 2018 post-dated the decision, he submitted that the tribunal could not lawfully take them into account.

22. It appears to me that Mr Arthurs is correct in his submission and that the tribunal has placed weight on evidence of post-decision circumstances. While there was other evidence before the tribunal, it clearly relied to a significant extent upon the precluded evidence in assessing the applicant's credibility. I consider that the overall conclusions of the tribunal on credibility are tainted by its consideration of post-decision evidence. I therefore accept that it is arguable that the tribunal has materially erred in law. I grant leave to appeal.
23. As each of the parties to the appeal submits that the tribunal has erred in law, I set aside the decision of the appeal tribunal under Article 15(7) of the Social Security (NI) Order 1998. I direct that the appeal shall be determined by a differently constituted tribunal.
24. The applicant may wish to consider whether attendance at the new tribunal hearing would be advisable in order to assist the tribunal in making accurate findings in relation to his mobility problems.

(signed): O Stockman

Commissioner

17 February 2020