

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 10 January 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. As will be explained in greater detail below, both parties have expressed the view that the decision appealed against was erroneous in point of law.
2. Accordingly, pursuant to the powers conferred on me by Article 15(7) of the Social Security (Northern Ireland) Order 1998, I allow the appeal, I set aside the decision appealed against and I refer the case to a differently constituted tribunal for determination.
3. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of her entitlement to Personal Independence Payment (PIP) remains to be determined by another appeal tribunal.
4. 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 17 July 2018, which decided that the appellant was not entitled to either component of PIP from and including 30 April 2018;
 - (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 PIP 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.

Background

5. On 17 July 2018 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 30 April 2018. Following a request to that effect, the decision dated 17 July 2018 was reconsidered on 8 August 2018 but was not changed. An appeal against the decision dated 17 July 2018 was received in the Department on 29 August 2018.
6. Following an earlier adjournment, the substantive appeal tribunal hearing took place on 10 January 2019. The appellant was present and was represented by Ms Williams of the Citizens Advice organisation. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 17 July 2018.
7. On 17 May 2019 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). On 6 June 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 24 June 2019 a further application for leave to appeal was received in the office of the Social Security Commissioners. Once again, the appellant was represented by Ms Williams. On 21 August 2019 observations on the application for leave to appeal were requested from Decision Making Services ('DMS'). In written observations dated 5 September 2019, Mr Arthurs, for DMS, supported the application for leave to appeal on three of the grounds submitted on behalf of the appellant. Written observations were shared with the appellant and Ms Williams on 5 September 2019.

9. The case became part of my workload on 5 February 2020. On 21 April 2020 I granted leave to appeal. In granting leave to appeal, I 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.

Errors of law

10. 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?
11. 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.”

Analysis

12. The agreed error of law with which I concur is the manner in which the appeal tribunal assessed certain of the evidence which was before it in connection with issues raised by the appeal namely, the potential applicability of certain of the activities in Parts 2 and Part 3 of Schedule 1 to the Personal Independence Pay Regulations (Northern Ireland) 2016 ('the 2016 Regulations').
13. As an example, Ms Williams has submitted that the appeal tribunal erred in:

‘... not fully considering activity for dressing/undressing in that (the appellant) wears the same clothes every day indicating showing no interest and would likely need to be prompted to wear appropriate clothing.’

14. Mr Arthurs provided the following response:

‘The Tribunal’s reasoning for its decision of an award of zero points is as follows:

“4. Dressing and Undressing

The Appellant’s account to the Tribunal was that he puts on the same clothes every day and that they lie on the floor. The account which was recorded by the Disability Assessor on 20/6/18 was that he could physically manage dressing and undressing. He would dress and change his clothes daily, without prompting, and tends to rotate the same clothing throughout the week. When this was clarified with the Appellant by the Tribunal, he did not accept the entry which had been made by the Disability Assessor. Overall, the Tribunal was of the view that the Appellant could dress and undress unaided and did not award any points under this activity.”

The Tribunal has not provided any reasons why they believe that (the appellant) can complete this activity safely, to an acceptable standard, repeatedly and within a

reasonable period of time. It has merely listed two conflicting accounts and decided that it would accept the Healthcare Professional's without any reasons why it has done this.

For this reason I submit that the Tribunal has erred in law.'

15. In *C8/08-09(IB)*, I stated, at paragraphs 61-62:

'60. ... there is a clear duty on appeal tribunals to undertake a rigorous assessment of all of the evidence before it and to give an *explicit* explanation as to why it has preferred, accepted or rejected evidence which is before it and which is relevant to the issues arising in the appeal.

61. In *R2/04(DLA)* a Tribunal of Commissioners, stated, at paragraph 22(5):

' ... there will be cases where the medical evidence before a particular tribunal will be unsatisfactory or deficient in an important respect. It will often be open to the tribunal hearing such a case to reject the medical evidence for that reason. Indeed, it will sometimes be its duty to do so. However, and in either case, the tribunal cannot simply ignore medical evidence which is not obviously irrelevant. It must acknowledge its existence and explain its reasons for rejecting it, even if, as will often be appropriate, such reasons are fairly short. We repeat, the decision whether a person suffers from a particular medical condition is a matter for the tribunal. That body must have regard to the whole of the evidence, including the medical evidence. Where it rejects medical evidence it must, unless the reasons are otherwise apparent, explain why it does so. Anything less is likely to result in an appeal being brought on the grounds that the tribunal has not given adequate reasons or that its decision is against the weight of the evidence.'

16. In *CT v Secretary of State for Defence* ([2009] UKUT 167, *CAF/0589/2009*), ('CT') Upper Tribunal Judge Jacobs said the following, at paragraph 31 of his decision:

'If the tribunal has rejected evidence, it must be clear why. It may be self-evident that particular evidence was irrelevant or unreliable, but it is always good practice to deal with it expressly. Failure to do so all too often leaves the claimant dissatisfied and generates unnecessary applications for permission.'

17. Those comments reflect my own remarks at paragraph 60 of *C8/08-09(IB)*. As was observed by Mr Arthurs, in *SC-v-SSWP (PIP)* ([2017] UKUT 0317 (AAC) ('SC')), Upper Tribunal Judge Gray stated at paragraph 20:

'A recitation of the evidence followed by an indication of how many points are awarded is neither a finding of fact nor a reason for the conclusion arrived at. A finding of fact can only result from subjecting the evidence to analysis and reasoning; it is not sufficient to set out the evidence and say that having considered it the tribunal was satisfied that the terms of a particular descriptor was met; the 'because' element is lacking. That element should explain what the tribunal accepted or rejected and why.'

18. In the section of the statement of reasons for the appeal tribunal's decision with respect to activity 4 does not meet the test of rigour in evidential assessment which I set out in *C8/08-09 (IB)* and as reflected in the comments of Upper Tribunal Judge Jacobs in *CT* and Upper Tribunal Judge Gray in *SC*. It is unfortunate that the errant approach in respect of activity 4 has also crept into the manner in which the appeal tribunal assessed the evidence in respect of other relevant activities.
19. Accordingly, as both parties have expressed the view that the decision appealed against was erroneous in point of law, pursuant to the powers conferred on me by Article 15(7) of the Social Security (Northern Ireland) Order 1998, I allow the appeal, I set aside the decision appealed against and I refer the case to a differently constituted tribunal for determination.

(signed): K Mullan

Chief Commissioner

16 June 2020