

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 26 July 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 26 July 2019 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
2. I am unable to exercise the power conferred on me by Article 15(8)a of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. An appeal tribunal which has a Medically Qualified Panel Member (MQPM) is best placed to assess medical evidence and address medical issues arising in an appeal. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.

4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his entitlement to Personal Independence Payment (PIP) remains to be determined by another appeal tribunal. In accordance with the guidance set out below, the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

Background

5. On 8 June 2018 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 27 March 2018. Following a request to that effect, the decision dated 8 June 2018 was reconsidered but was not changed. An appeal against the decision dated 8 June 2018 was received in the Department on 16 July 2018.
6. Following an earlier adjournment, the substantive appeal tribunal hearing took place on 26 July 2019. The appellant was present and was represented by Ms Fulton of Advice North West. There was no departmental Presenting Officer present. The appeal disallowed the appeal and confirmed the decision dated 8 June 2018. The appeal tribunal 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, however, 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.
7. On 10 December 2019 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 23 December 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member.

Proceedings before the Social Security Commissioner

8. On 17 January 2020 a further application for leave to appeal was received in the office of the Social Security Commissioners. The appellant was, once again, represented by Ms Fulton. On 4 February 2020 observations on the application were requested from Decision Making Services ('DMS'). In written observations dated 26 February 2020, Ms Patterson, for DMS, agreed that the decision of the appeal tribunal was in error of law but queried whether the error was material. Written observations were shared with the appellant and Ms Fulton on 26 February 2020.

9. The case became part of my workload on 12 May 2020. On 13 May 2020 I granted leave to appeal. When granting leave to appeal I gave as a reason that 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. This appeal centres on the manner in which the appeal tribunal addressed the potential applicability of activity 9 in Part 2 of Schedule 1

to the Personal Independence Pay Regulations (Northern Ireland) 2016 ('the 2016 Regulations'). The appeal tribunal applied descriptor (a) in activity 9 which reads 'Can engage with other people unaided' and which attracts a score of 0 points.

13. In the record of proceedings for the appeal tribunal hearing, the following is recorded:

"Question: Your security job – how long were you doing it?

Answer: 36 years.

...

Question: How did you find that work?

Answer: I could be sent anywhere. The last was Carrickmore. I worked all over.

Question: You drove to your various workplaces?

Answer: Yes.

...

Question: You worked on the wind farms?

Answer: Yes. The last job was from 2015 to 2018.

...

Question: Have you problems out meeting people?

Answer: I don't trust some people. I trust women more than men. I couldn't cope with a panel of men here.'

14. As was noted by Ms Patterson, the Tribunal included the following findings of fact in the statement of reasons for its decision:

'... he has depression and anxiety with past history of overdose with an attendance at Psychology due to sexual abuse as a child which caused trauma. He has cough syncope with panic attacks and the panic attacks appear to have necessitated his employers calling an ambulance on a number of occasions whilst he was at work ...'

'He was referred to Psychology in February 2018 and attended.'

15. The appeal tribunal's reasons for its conclusion with respect to activity 9 were as follows:

'The Tribunal notes that the Claimant worked for very many years as a security guard and the Tribunal also

notes that the Claimant drove for many years until he had to stop due to sleep apnoea. The Tribunal is not persuaded by the written evidence in this regard. The Tribunal understands that because of his childhood trauma he may have some distrust of men but this did not prevent him from engaging in his work where he would clearly have contact with strangers both male and female and also whilst driving. The Tribunal is satisfied that he can engage with other people unaided for the vast majority of the time.'

16. In Part 1 of Schedule 1 to the 2016 Regulations, there is the following definition:

“engage socially means –

- (a) interact with others in a contextually and socially appropriate manner;
- (b) understand body language; and
- (c) establish relationships.’

17. In paragraph 4.251 of Volume 1 of *Social Security Legislation* the authors make the following general remarks about activity 9 and the definition in part 1 of Schedule 1 to the 2016 Regulations:

‘It is important to note that the function required here of the claimant is to engage socially. Although those words do not appear directly in the Activity it has been accepted that they are to be imported from the definitions in Part 1 of the schedule.’

18. In *SF v The Secretary of State* ([2016] UKUT 0543 (AAC)) (*SF*), Upper Tribunal Judge Bano, when considering activity 9 in Part 2 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2016 in Great Britain, said the following, at paragraphs 5 and 6:

‘5. The drafting of PIP Activity 9 is unsatisfactory. Schedule 1, Part 1 paragraph 1 to the Social Security (Personal Independence Payment) Regulations 2013 provides that ‘engage socially’ means:

- (a) interact with others in a contextually and socially appropriate manner;

(b) understand body language

(c) establish relationships

Although Activity 9 does not specifically refer to engagement in a social context, the Secretary of State nevertheless accepts (para. 9 of the submission) that Activity 9 involves the ability to function in a social environment.

6. As Judge Mark pointed out in *AM v Secretary of State for Work and Pensions* [2015] UKUT 215 (AAC), the term 'engage socially' does not appear anywhere else in Schedule 1 to the PIP Regulations. However, descriptor 9c. applies to claimants who need 'social support to be able to engage with other people', and 'social support' is defined in paragraph 1 of Schedule 1 as 'support from a person trained or experienced in assisting people to engage in social situations'. Descriptor 9c. is therefore concerned with the support required by claimants in social situations. Although it applies to claimants who need a higher level of support in such situations than mere prompting, there is no reason to suppose that descriptors 9b. and 9 c. are concerned with a claimant's ability to engage with other people in different factual contexts. That construction of Activity 9 explains why 'engage socially' is defined in Schedule 1, and without wishing to express a concluded view on the issue in a case in which it has not been argued, I therefore consider that the whole of PIP Activity 9 is concerned with a claimant's ability to engage with other people face to face in social situations. It would follow that in all cases in which Activity 9 is in issue decision makers should apply the definition of 'engage socially' in Schedule 1 and should consider a claimant's ability to interact with others in a contextually and socially appropriate manner, the claimant's ability to understand body language, and the claimant's ability to establish relationships in a social context.'

19. I adopt and accept the reasoning and analysis of Upper Tribunal Judge Bano, which, in my view, properly reflects the law in Northern Ireland.
20. Returning to the instant case, the appeal tribunal relied on evidence that the appellant had worked for 36 years and that his work involved driving

as support for its conclusion that the application of descriptor (a) of activity 9 was appropriate.

21. There are several aspects of that reasoning which are problematic. Firstly, it is accepted that, as Upper Tribunal Judge Bano put it, activity 9 ‘... is concerned with a claimant’s ability to engage with other people face to face in social situations.’ Secondly, even if the appeal tribunal was considering that there was a ‘social’ element to the appellant’s working environment, the evidence was to the opposite that the environment was a solitary one. Thirdly, and turning to the appeal tribunal’s reliance on the appellant’s ability to drive as part of his employment requirements, I accept that in *JMcD-v-Department for Communities (PIP)* [2019] NICom 4, (*JMcD*) Commissioner Stockman said the following, at paragraphs 18 to 20:

‘18. ... The ability of a claimant to perform one type of daily activity which is not within the scheduled activities can be helpful in determining whether he or she has the ability to perform certain other activities which are.

19. Ability to drive a car is dependent on certain functional and cognitive abilities. Among other things, it requires the ability to open the door and enter and exit the vehicle; to sit without changing position for a period of time; to use the hands to grip and turn the controls and to make nuanced arm movements to steer; to use the feet on pedals to accelerate and brake, and to use the clutch in a manual car; to move the upper body and neck flexibly to look around; to be able to plan a journey and respond to unpredictable circumstances and road conditions; and to have adequate vision and reactions to drive safely.

20. The ability to drive a car is not consistent with a high level of dependency on others with the activities of daily living. It is legitimate for a tribunal to consider how the actions involved in driving a car may read across into the scheduled daily living and mobility activities. Nevertheless, that general principle is subject to the qualification that the activity in question is genuinely comparable and that it is done with the same level or regularity as the scheduled activity. The ability to perform daily living activities has to be addressed within the context of regulation 4 and regulation 7 of the PIP Regulations. The implication is that occasional driving may not be an appropriate comparator. It is certainly arguable that, unless the tribunal determines whether a

claimant could drive on over 50% of the days in the required period, it has not properly addressed regulation 7, for example.'

22. I cannot, however, understand how evidence of an ability to drive as part of employment requirements (noting that there is no suggestion that the appellant was accompanied when driving to his various work locations) can be read across to an activity which is concerned with an ability to engage with other people face to face in social situations.
23. For all of these reasons, I have concluded that the appeal tribunal has been mistaken in the approach which it took to the potential application of activity 9 in Part 2 of Schedule 1 to the 2016 Regulations and, for that reason, its decision is in error of law.
24. I turn to the Ms Patterson's further submission that the identified error was not material. The basis for that submission was that as the appeal tribunal had awarded a total of five points for other daily living activities, in order to achieve the scoring threshold for entitlement to the daily living component, the appellant would have to satisfy descriptor c or descriptor d in activity 9. Ms Patterson asserts that on the basis of the evidence which is available to her the appellant would not satisfy either descriptor. The emphasis here is my own. The evidence which is available to Ms Patterson is the same evidence which is available to me. The key is that the evidence is limited and, crucially, does not include the appellant's own oral evidence. In addition, and as I have often noted, fact-finding is usually best left to the specialist fact-finding body, the appeal tribunal, which has the advantage of having at its disposal an MQPM. For that reason I refer the case to a differently constituted appeal tribunal for re-determination.

Disposal

25. The decision of the appeal tribunal dated 26 July 2019 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
26. 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 8 June 2018 in which a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 27 March 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.

(signed): K Mullan

Chief Commissioner

6 July 2020