

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 1 March 2019

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 Dungannon.
2. An oral hearing of the application has been requested. However, I consider that the proceedings can properly be determined without an oral hearing.
3. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

4. The appellant had a previous award of disability living allowance (DLA) from 20 January 2003, most recently at the low rate of the mobility component and the middle rate of the care component. He was invited to claim personal independence payment (PIP) by the Department for Communities (the Department) and made a PIP claim from 6 November 2017 on the basis of needs arising from depression, anxiety, sleep problems, drink addiction, chronic obstructive pulmonary disease (COPD), chest infections, breathlessness, a hernia and Bells' Palsy. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 30 November 2017. A general practitioner (GP) report relating to his DLA claim was received by

the Department on 1 December 2017 and a medical print out was received on 18 December 2017. Letters from his carer and the appellant's GP were received on 4 January 2018. He was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 4 January 2018. On 29 January 2018 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 6 November 2017. The appellant requested a reconsideration of the decision, submitting further evidence, and he was notified that the decision had been reconsidered by the Department but not revised. He appealed.

5. 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 1 March 2019 the tribunal disallowed the appeal in relation to daily living component but allowed the appeal in relation to mobility component, awarding standard rate mobility component for a three year period from and including 28 February 2018. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 31 May 2019. The appellant 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 23 July 2019. On 8 August 2019 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant submits that the tribunal has erred in law on the basis that:
 - (i) it did not consider that he needed someone to buy his food as otherwise he would spend his food money on alcohol;
 - (ii) his left hand arthritis was not considered by the tribunal;
 - (iii) he needed prompting and assistance to carry out general daily living tasks, such as preparing food as he cannot read instructions, taking medication, dressing, washing and engaging with others.
7. The Department was invited to make observations on the appellant's grounds. Mr Arthurs of Decision Making Services (DMS) responded on behalf of the Department. Mr Arthurs submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.

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 questionnaire completed by the appellant, a consultation report from the HCP, a general practitioner (GP) factual report from the previous DLA claim, letters from the appellant's daughter and some medical evidence. The tribunal also had sight of the appellant's medical records. The appellant attended the hearing and gave oral evidence, accompanied by his daughter and represented by Ms Doris. The Department was represented by Mr Noble. It was explained at the outset that the appellant could not read or write.
9. In the statement of reasons the tribunal addresses each activity sequentially, referencing the appellant's mental health, breathlessness, hernia, alcohol intake and Bell's palsy where relevant. The tribunal noted that the appellant's anti-depression medication was first line standard dosage with no secondary input and that his COPD was GP-managed without specialist referral. It observed that alcohol dependency was not listed as an active or past problem in the medical records. It found that the appellant would not have difficulties with most daily living activities. However, it awarded points for activity 8(c) (reading and understanding complex verbal information) and 10(b) (making complex budgeting decision) arising from the appellant's learning difficulties.
10. The tribunal considered that the appellant would not have difficulties with planning and following journeys. However, it accepted that the appellant would be restricted by COPD in walking repeatedly and within a reasonable time period, awarding 8 points for activity 2(c). It awarded standard rate mobility component for a three year period.

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.

13. The nature of the assessment is qualified, *inter alia*, by regulation 4, which 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.

Assessment

14. 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.
15. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
16. 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.
17. The appellant’s daughter submits that the tribunal did not consider the fact that the appellant needed someone to buy his food for him, as otherwise he would spend his food money on alcohol. I grant leave to appeal as this is an arguable point.
18. The conditions of entitlement to PIP provide two activities relating to food. These are activity 1 (Preparing food) and activity 2 (Taking nutrition). However, the relevant activities are further defined. “Prepare” in the context of food means to make food ready for cooking or eating. “Take nutrition” means to “cut food into pieces, convey food and drink to one’s mouth and chew and swallow food and drink” or “to take nutrition by using a therapeutic source”.
19. For the reasons I gave in *JMcG v Department for Communities* [2019] NI Com 77, at paragraphs 34-36, the activity of preparing food does not include the preliminary processes of shopping and buying food. Further, the activity of taking nutrition refers essentially to the process of ingesting food.
20. I can understand that the appellant may reasonably require a family member to ensure that he prioritises the buying of food over the buying of alcohol. However, this is not an activity that falls within the categories of preparing food or taking nutrition. It seems to me that it more directly falls within the category of managing household expenditure. The tribunal has made express allowance for that by awarding points under the activity of “making budgeting decisions”. The relevant activity provides for the award of points as follows:

10. Making budgeting decisions.

- a. Can manage complex budgeting decisions unaided. 0
- b. Needs prompting or assistance to be able to make complex budgeting decisions. 2
- c. Needs prompting or assistance to be able to make simple budgeting decisions. 4
- d. Cannot make any budgeting decisions at all. 6

21. The tribunal awarded 2 points for descriptor 10(b). Again the relevant descriptors are augmented by definitions. It might initially appear that there was a case for an award under 10(c) on the basis that alcohol abuse compromised the appellant's ability to prioritise buying food over alcohol and thereby gave rise to a need for assistance in making a simple budgeting decision. However, under the relevant definition:

“simple budgeting decisions” means decisions involving—

- (a) calculating the cost of goods; and
- (b) calculating change required after a purchase;

22. Thus, the descriptor is not addressed to the choice of what to buy, but rather the ability to understand to cost of items. Therefore, this provision cannot assist the appellant.

23. The second ground advanced is that the tribunal did not address the appellant's left hand arthritis. Whereas a number of his medical conditions are set out, this particular condition is not mentioned in the questionnaire completed on behalf of the appellant. An extract from the appellant's GP records was given to the tribunal, and left hand arthritis was not listed as an active problem, although among past problems there was a reference to a left wrist fracture back in 1991. When seen by a healthcare professional, left hand arthritis was not stated by the appellant as an active problem and on examination he had normal pinch and grip power in both hands. There was no mention of left hand arthritis in the letter of appeal and there was no oral evidence of left hand arthritis noted in the record of proceedings. While this is now advanced as a relevant condition, there is nothing in the evidence before the tribunal to indicate that it is a problem and no evidence was given to the tribunal about it. I

cannot fault a tribunal for not addressing a condition that was not raised at any stage before it.

24. The appellant further submits that the tribunal did not address his need for guidance and prompting in carrying out daily activities. However, prompting and assistance regarding reading instructions in relation to cooking and taking medication was addressed by the tribunal. Similarly, prompting to dress, wash and use the toilet were matters considered by the tribunal in evidence. The tribunal found against the appellant in terms of whether he required the prompting and supervision stated. The evidence before the tribunal did not compel a contrary conclusion and therefore its decision was not irrational and was open to it as a matter of law.
25. I conclude that the appellant has not demonstrated that the tribunal has erred in law and I disallow the appeal.

(signed): O Stockman

Commissioner

28 January 2020