

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 16 February 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 with reference BE/8136/17/02/D.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. This appeal considers the form of authority required by a representative to make an application on behalf of an appellant in proceedings under the Social Security (NI) Order 1998. It also addresses deficiencies in a tribunal's statement of reasons due to accidental error.
4. The appellant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 31 May 2017 on the basis of needs arising from ankylosing spondylitis and anxiety. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 28 June 2017 along with further evidence. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on or around 8 August 2017. On 15 August 2017 the

Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 31 May 2017. The appellant requested a reconsideration of the decision. On 26 September 2017 he was notified that the decision had been reconsidered by the Department but not revised. He appealed on 27 October 2017, naming his wife as his representative on a Great Britain SSCS1 appeal pro forma that he completed, attaching a detailed typed submission. The late appeal was accepted by the Department.

5. The appeal was listed for hearing by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. On 11 January 2018 the appellant indicated his wish to be represented at the hearing by Mr H. On 12 February 2018 Mr H sent a detailed submission and further medical evidence to the tribunal. The tribunal disallowed the appeal after a hearing on 16 February 2018, at which the appellant was represented by Mr H. The appellant then requested a statement of reasons for the tribunal's decision and this was issued to the appellant on 5 October 2018. The statement of reasons as issued included evidence in relation to daily living component and mobility component, but recorded findings in relation to mobility component only.
6. On 14 January 2019 Mr H applied to the LQM for leave to appeal from the decision of the appeal tribunal, relying on the absence of findings and reasons for the daily living component. On 29 January 2019 Mr H requested a further copy of the statement of reasons, submitting that the version he had seen appeared incomplete. It may well be that some prior oral communication had taken place about this issue, because on 28 January 2019 the Appeals Service wrote to Mr H to indicate that it did not have a signed form of authority from the appellant to enable him to make applications on his behalf. The Appeals Service indicated that no further action would be taken until a signed and completed "Form of Authority" was received.
7. It would appear that no signed and completed Form of Authority was provided by Mr H. In addition the application of 14 January 2019 was late, as it was received more than one month after the statement of reasons was issued. While it was within the absolute time limit for such applications, reasons for lateness were not provided. The application for leave to appeal was rejected by a determination of the LQM issued on 24 June 2019. On 2 August 2019 an OSSC1 form completed in the name of Mr H was received by the Office of the Social Security Commissioners.

Interlocutory matters

8. On 2 August 2019, by an OSSC1 form, Mr H sought to initiate legal proceedings before the Social Security Commissioner on behalf of the appellant under Article 15 of the Social Security (NI) Order 1998 (the 1998 Order). However, he had put his own name in the space where the

appellant should be named, and he did not name the appellant on the application form. The space on the form provided for the appellant to appoint a representative was left blank. Therefore the proceedings were irregular and not in compliance with regulation 10 of the Social Security Commissioners (Procedure) Regulations (NI) 1999 (the Commissioners Procedure Regulations). The application was also received after the expiry of the relevant statutory time limit.

9. After some communication, in order to progress matters, a separate form of authority was issued by the Office of the Social Security Commissioners to the appellant. He completed it and returned it on 4 October 2019, authorising Mr H to act on his behalf in the proceedings before the Commissioner.
10. On 6 June 2020 the Chief Social Security Commissioner admitted the late application for special reasons under regulation 9(3) of Commissioners Procedure Regulations.
11. By regulation 27 of the Commissioners Procedure Regulations, irregularity does not of itself invalidate the proceedings. In the light of all the circumstances of the case, I waive the irregularity in the proceedings and accept these as validly brought.

Grounds

12. The appellant, represented by Mr H, submits that the tribunal has erred in law by failing to give reasons for that part of its decision that concerned the daily living component.
13. The Department was invited to make observations on the appellant's grounds. Ms Patterson of Decision Making Services (DMS) responded on behalf of the Department. Ms Patterson submitted that the tribunal had erred in law as alleged. She indicated that the Department supported the application.

The tribunal's decision

14. 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 appellant, a PA4 V3 consultation report from the HCP, medical evidence submitted by the appellant and a statement of grounds of appeal. It further had a copy of the appellant's medical records. Although not referred to in the statement of reasons, it is also evident that the tribunal had a cogent written submission from Mr H attaching further medical evidence. The record of proceedings indicates that evidence was adduced relating to both the daily living and the mobility components.

15. The statement of reasons explains the tribunal found on the basis of the evidence that the appellant was regularly restricted in his mobility to 50-200 metres accepting that he should be awarded 4 points for activity 2.b. The same passage relating to mobility is duplicated in the section of the reasons that deals with daily living. The applicant and any outside observers, therefore, have no information about the tribunal's reasons for awarding 4 points for daily living activities 4.b and 6.b, and for not awarding points for any other daily living activities.

Relevant legislation

16. 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.
17. 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

18. 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.
19. 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.
20. 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.
21. The ground on which Mr H relies is that the tribunal has not stated reasons for that part of its decision that deals with daily living activities. Failure to give reasons is a sub-category of the requirement of procedural fairness. This ground is supported by the Department. I grant leave to appeal on that ground. Before returning to that issue,

however, I wish to say some things about the nature of representation in social security appeals.

Representatives in social security appeals

22. Social security appeals are legal proceedings. This case has involved an appeal under Article 13 of the Social Security (NI) Order 1998 (the Order) to the appeal tribunal and is now an application for leave to appeal to a Social Security Commissioner under Article 15 of the Order. As they are legal proceedings, a third party cannot simply purport to represent an appellant, or to initiate legal proceedings on their behalf, as if those proceedings are their own. In general, prior written authority is required.
23. It is generally accepted that social security appeals can involve complex issues of law. Appellants can find them confusing and intimidating. Whereas small pockets of state provision for legal assistance in social security proceedings remain, such as under Article 10A of the Legal Aid, Advice and Assistance (NI) Order 1981, in general legal practitioners do not involve themselves in appeal tribunal or Commissioner proceedings. In the absence of professional lawyers, some State support has been provided to non-governmental organisations to offer representation services, or has been provided on a charitable basis by relevant agencies supporting, for example, persons with particular types of disability. Political representatives have also involved themselves in tribunal proceedings in support of their own constituents. Well-meaning friends with varying skill levels may also become involved. Standards of representation vary, but a common factor is that, whoever they are, all representatives must understand and observe the rules of procedure.
24. Appeals and applications under the Order are governed by delegated procedure regulations. In the case of appeal tribunals, these are the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the Decisions and Appeals Regulations). In the case of Commissioner appeals, they are the Commissioners Procedure Regulations. It is incumbent on any representative to read the relevant procedure rules prior to undertaking representation. The representative should pay particular attention to time limits. The representatives should also pay close attention to the provisions enabling them to act on behalf of the appellant.
25. In the case of the Commissioners Procedure Regulations, the rules are relatively simple. By regulation 17 “a party may conduct his case himself (...) or be represented by any person whom he may appoint for that purpose”. This is similar to the position in Great Britain where, under rule 11(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, a party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings and

by rule 11(5) “anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement”. However, the modernisation of tribunal procedure rules has not been undertaken in Northern Ireland and the Decisions and Appeals Regulations in force in Northern Ireland are more complicated.

26. The Decisions and Appeals Regulations make provision for a representative to attend a hearing. Regulation 49(8) provides that:

“(8) A person who has the right to be heard at a hearing may be accompanied and may be represented by another person whether having professional qualifications or not and, for the purposes of the proceedings at the hearing, any such representative shall have all the rights and powers to which the person whom he represents is entitled”.

27. By regulation 49(7) any party to the proceedings shall be entitled to be present and to be heard. By regulation 49(11) any person entitled to be heard at an oral hearing may address the tribunal, may give evidence, may call witnesses and may put questions directly to any other person called as a witness. The representative at a hearing, therefore, has the rights set out in regulation 49(11). However, those rights are restricted to “the purposes of the proceedings at the hearing”.

28. However, the Decisions and Appeals Regulations make further provision relating to the role of the representative, where a person with a right of appeal has provided written authority to a representative to act on his behalf. For example,

- by regulation 33(1)(a)(ii), an appeal, or an application for an extension of time for appealing, may be made by a representative.
- by regulation 57(3)(b) an application for setting aside of the tribunal’s decision may be made by a representative.
- by regulation 58(1)(b) an application for leave to appeal may be made by a representative.

29. A common factor is that each of these actions initiates an new adjudication procedure and in each case the appellant must have provided express written authority to the representative to initiate that procedure on his behalf.

30. There are other actions that a party to proceedings may need to take where no mention is made in the Decisions and Appeals Regulations of

authorising a representative to take them. These include seeking adjournment or postponement of a hearing, requesting a statement of reasons for the tribunal's decision, applying for an extension of time to make application for a statement of reasons, and applying for a copy of the tribunal's record of proceedings. Although the Decisions and Appeals Regulations are silent on the role of a representative in relation to these, I do not believe that it is because it was intended to exclude representatives from having the authority to act in these matters. Rather, I consider that it is implied by the power under regulation 49(8).

31. In the case of *CD v Department for Communities [2020] NI Com 78*, I expressed some criticism of the Appeals Service for requiring its own pro forma "Form of Authority" to be completed before a request of a statement of reasons could be actioned. That was a case where the representative had previously provided a comprehensive form of authority of his own. I should be clear that, rather than depend on implied rights, I consider that it is best practice for a representative to obtain a comprehensive form of authority. It may be that the Appeals Service pro forma serves that purpose, but there is nothing to prevent a representative agency utilising its own pro forma.
32. As observed above, I consider that actions taken by a representative that would have the effect of initiating new proceedings require unambiguous written authority. The authority given to Mr H by the appellant was dated 11 January 2018. All it said was "I wish to be represented at my forthcoming PIP appeal by Mr... H...". This is a very limited form of authority, restricted to representing at the hearing and taking steps reasonably ancillary to that. In the light of the requirements of regulation 58(1)(b) of the Decisions and Appeals Regulations, I do not consider that this authority gave Mr H the right to make an application for leave to appeal to the LQM on the appellant's behalf. Therefore, in the particular case, the Appeals Service was correct to require a form of authority for the application for leave to appeal to the LQM and the related extension of time. The LQM was correct to reject the application.
33. One observation that I would make is that it seems odd that, if Mr H was not authorised to act, the Appeals Service wrote to him to pursue the authorisation, rather than write directly to the appellant. As it was, no remedial action was invited from the appellant in the matter and this inevitably led to the rejection of the application for leave to appeal by the LQM.

The application to the Commissioner

34. Happily for the appellant, the rejection of the application for leave to appeal by the LQM is not a fatal step and gives rise to the possibility of an application for leave to appeal to the Commissioner.

35. Although made both irregularly and late by Mr H, this application has been admitted as there is merit in the ground advanced. Mr H had observed that the LQM – or the Appeals Service administration - had erroneously duplicated the findings and reasons on the mobility component in place of issuing findings and reasons on the daily living component. In short, the reasons for the decision are incomplete. Although the reasons are incomplete as a result of what I believe to be a simple administrative error, this does not alter the fact that they are legally inadequate. Ms Patterson for the Department accepts that this is an error of law. She is correct in her view. A lawful statement of reasons should address both components of PIP and this statement of reasons did not.
36. The irony is that Mr H was trying to communicate all this to the Appeals Service in January 2019 when they declined to deal with him on the basis that he was not an authorised representative. He had requested a further copy of the statement of reasons to confirm the error. This should have been issued under the general authority to represent at the hearing, derived from regulation 49. A quick check would probably have revealed that the reasons had been incorrectly formatted. It seems likely that this could have been cured by the correction of accidental errors procedure or, if that was not possible, by the decision being set aside by the LQM by consent at that date. However, that is not what happened.
37. On the basis that the tribunal has not given reasons for that part of its decision dealing with the daily living component, I find that it has erred in law. I set aside its decision and I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

27 January 2021