

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 28 April 2021

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from the decision of an appeal tribunal with reference BE/3417/20/02/D.
2. For the reasons I give below, I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The appellant claimed Personal Independence Payment (PIP) from the Department for Communities (the Department) from 6 January 2020 on the basis of needs arising from depression, anxiety and migraines. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 19 February 2020. He was asked to participate in a consultation by telephone with a healthcare professional (HCP) and the Department received a report of the consultation on 1 April 2020. On 20 June 2020 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 6 January 2020. The appellant requested a reconsideration of the decision, submitting a HCP's opinion that he had limited capability for work related activity for universal credit (UC) purposes, dated April 2019. The Department obtained a supplementary advice note. The appellant was notified that the decision had been reconsidered by the

Department but not revised. He appealed, but subsequently waived the right to attend an oral hearing of the appeal.

4. The appeal was considered on the papers by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member on 28 April 2021. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 30 June 2021. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal and leave to appeal was granted by the salaried legal member by a determination issued on 19 August 2021. The ground on which leave to appeal was granted was expressed as a question, namely "Have the Tribunal applied the correct test in this appeal in particular does the phrase used at paragraph 14 of the reasons for decision "the legislation envisages someone who is significantly affected and who would present in a state of disarray" add a gloss to the statutory criteria?". On 13 September 2021 the appellant lodged his appeal with the office of the Social Security Commissioners. He renewed the grounds of application on which leave to appeal was not granted, along with his grounds of appeal.

Grounds

5. The appellant submits that the tribunal has erred in law by:
 - (i) placing weight mainly on a HCP consultation held by telephone, which he submitted would give a false impression of his mental health;
 - (ii) failing to take post-decision deterioration of his mental health into account, particularly during the Covid 19 pandemic;
 - (iii) wrongly rejecting his evidence of self-neglect in respect of eating, hygiene and toileting;
 - (iv) basing its decision on whether he would "present in a state of disarray", when neither the HCP nor the tribunal could see him or his personal environment.
6. The Department was invited to make observations on the appeal grounds. Ms Patterson of Decision Making Services (DMS) responded on behalf of the Department. She submitted that the tribunal had erred in law and indicated that the Department supported the appeal.

The tribunal's decision

7. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal held a paper hearing in the absence of the parties. It had documentary material before it consisting of the Department's submission, which contained a PIP2 questionnaire completed by the appellant and a consultation report from the HCP. It had

sight of a HCP's report prepared for UC purposes, which found the appellant unfit for work related activity in April 2019 and a supplementary advice note. It had a copy of his medical records and further UC related material.

8. The tribunal noted that it was looking at how the appellant was on 20 June 2020. It noted that he complained of a lack of motivation, needing encouragement to eat and take medication. He stated that he had become withdrawn and lacked interest in his appearance. He did not leave his home and spoke only to his parents. The tribunal considered his medical records. It accepted that he was experiencing anxiety with obsessive behaviour and almost daily headaches. It accepted that he had loss of interest but did not see evidence that it was to such an extent that he would neglect himself in terms of food and toileting. It indicated that the legislation envisages someone who is significantly affected and who would present in a state of disarray.

Relevant legislation

9. 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.
10. 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.
11. Additionally, by regulation 4, certain other parameters for the assessment of daily living and mobility activities, as follows:

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

12. The salaried LQM granted leave to appeal, asking “Have the Tribunal applied the correct test in this appeal in particular does the phrase used at paragraph 14 of the reasons for decision “the legislation envisages someone who is significantly affected and who would present in a state of disarray” add a gloss to the statutory criteria?”.
13. Addressing, that issue, and the appellant's grounds of appeal generally, Ms Patterson for the Department observed:

“At paragraph 14 of its reasons, the Tribunal has recorded:

‘We acknowledge the appellant has health issues. Whilst he has described a loss of interest, which we accept, we did not see evidence that it was to such extent that he would neglect himself in terms of food and toileting. We have gone through the various

activities and attempted to envisage how the appellant would be restricted. We thought it likely that much of the joy of living has gone for now and he may not take the same interest in his appearance or what he wears as in the past. However the legislation envisages someone who is significantly affected and who would present in a state of disarray.'

The discussion regarding [the appellant's] appearance and whether he neglects himself stems from consideration of Preparing Food and Toileting – the latter of which I would interpret to mean his acts of personal hygiene.

The tribunal's comments readily relate to daily living activities 4 and 6. In his PIP2 form [the appellant] said regarding activity 4 (Washing and bathing) and activity 6 (Dressing and undressing) that he needs help as he lacks motivation due to suffering from depression. He is prone to self-neglect and needs encouragement from family to wash and bathe. He further stated he needs encouragement to get dressed in the mornings and undressed at night, otherwise he would stay in old clothes.

The Personal Independence Payment Regulations (NI) 2016 define prompting as:

'means reminding, encouraging or explaining by another person'.

The Personal Independence Payment Assessment Guide (PIPAG) includes relevant guidance in relation to the term prompting. Whilst the PIPAG is not determinative of the law, it does provide information as to the interpretation of descriptors. Taking Activity 1 first, in relation to descriptor 1d – 'needs prompting to be able to either prepare or cook a simple meal', it states:

'Prompting' means reminding, encouraging or explaining by another person. For example: may apply to claimants who lack motivation to prepare and cook a simple meal on the majority of days due to a mental health condition or who need to be reminded how to prepare and cook food on the majority of days.'

Regarding descriptor 4c – 'needs supervision or prompting to be able to wash or bathe', it states:

‘Prompting’ means reminding, encouraging or explaining by another person. For example: may apply to claimants who lack motivation or need to be reminded to wash, or require supervision for safety reasons. When considering safety, use of both a bath and shower should be considered.’

In regard to descriptor 6c – ‘needs either i. prompting to be able to dress, undress or determine appropriate circumstances for remaining clothes; or ii. Prompting or assistance to be able to select appropriate clothing’ the PIP Assessment Guide advises:

“Prompting’ means reminding, encouraging or explaining by another person. For example: may apply to claimants who need to be encouraged to dress at appropriate times, e.g. when leaving the house or receiving visitors. Includes a consideration of whether the claimant can determine what is appropriate for the environment, such as time of day and the weather.’

I would contend that the tribunal has applied the wrong test here. The claimant need not ‘present in a state of disarray’ to qualify for points in respect of prompting. He *may* present in a state of disarray had he not had prompting from another person, but would not if this prompting or encouragement to wash or dress has taken place. I note the comments of Judge Hemingway in the decision of the Upper Tribunal, *MB v SSWP (PIP)* [2016] UKUT 0250 (AAC), where he states at paragraph 20:

‘...the need must be reasonable in the sense that the aid, appliance, supervision, prompting or assistance is genuinely needed such that the mere fact it is used or received does not mean it is needed and the mere fact that it is not received does not mean it is not needed.’

Therefore, I would suggest that to make findings based solely on how a person presents physically is too simplistic. I would agree with [the appellant] and the Legally Qualified Member that the tribunal may have erred in law here and that there is no legislative basis for the belief that a person who lacks motivation to perform activities must necessarily present in a state of disarray.

Furthermore, [the appellant] has disputed how the tribunal could make comment on his appearance given the fact that he was not present at the appeal hearing and had not been physically observed by the Disability Assessor (again due to the assessment being undertaken over the phone). I would agree that this seems entirely unsubstantiated”.

14. By his second ground, the appellant criticises the tribunal for not taking post-decision deterioration of his mental health into account, particularly during the Covid 19 pandemic. However, by article 13(8)(b) of the Social Security (NI) Order 1998 a tribunal is precluded from considering circumstances that were not obtaining at the date the decision under appeal was made. Whereas a significant deterioration in the appellant’s condition might ground a fresh claim, the tribunal applied the law correctly in respect of his present claim.
15. More generally, the appellant criticises the weight placed by the tribunal on the report of the HCP when the consultation was conducted by telephone. He submits that his evidence of self-neglect was not adequately dealt with by the tribunal and that the tribunal made findings to the effect that he was not in a state of disarray, despite being unable to see his personal environment and therefore having no evidence of this.
16. The LQM granted leave to appeal on the somewhat broader point that the tribunal, when referring to the legislation requiring a claimant to present in a state of disarray, had not applied the correct statutory test. This ground is supported by Ms Patterson the Department. She addresses the legislation and the Departmental guidance and submits that there is no basis for adding a requirement that a claimant should present in a state of disarray. She adds, relying on Upper Tribunal case law, that a need for prompting or supervision may meet the statutory criteria and have the outcome that, after receiving input, the claimant might not present in a state of disarray. She further agrees with the appellant that, in the absence of the HCP having seen him, there was no evidence at all about his appearance.
17. I accept the submissions of the parties. The tribunal does appear to have “added a gloss” to the legislation in the terms used in the grant of leave to appeal. There is no requirement in the legislation that the claimant should present in a state of disarray. Furthermore, in circumstances where neither the HCP nor the tribunal observed the appellant, I see no basis in evidence for a finding about his appearance. I find that the tribunal has erred in law. I allow the appeal and I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

2 February 2022