

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 20 June 2022

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 DP/7466/21/02/D.
2. For the reasons I give below, I grant leave to appeal. I set aside the decision of the appeal tribunal under Article 15(7) of the Social Security (NI) Order 1998.

REASONS

Background

3. The applicant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 27 January 2021 on the basis of needs arising from anxiety/depression, being perimenopausal, headaches, body pain diagnosed as fibromyalgia and allergies. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 5 February 2021. A general practitioner (GP) factual report was obtained by the Department. The applicant was asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 12 May 2021. On 26 May 2021 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 27 January 2021. The applicant requested a reconsideration of the decision, submitting further evidence. A supplementary advice note was obtained by the Department. The applicant was notified that the

decision had been reconsidered by the Department but not revised. She appealed out of time, but the late appeal was admitted by the Department.

4. The appeal was considered by way of an online video hearing on 20 June 2022 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision, and this was issued on 4 October 2022. The applicant 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 16 November 2022. On 12 December 2022 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The applicant submits that the tribunal has erred in law by failing to make sufficient findings of fact and acting unfairly by failing to wait for the report of an MRI scan before reaching a decision.
6. The Department was invited to make observations on the applicant's grounds. Mr Clements of Decision Making Services (DMS) responded on behalf of the Department. Mr Clements accepted that the tribunal had materially erred in law. He indicated that the Department supported the application.

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 had documentary material before it consisting of the Department's submission, containing the PIP2 questionnaire completed by the applicant, the GP factual report, a consultation report from the HCP, correspondence, a GP surgery report, and a supplementary advice note. The tribunal also had sight of the applicant's GP records. The applicant attended the hearing remotely by video link and gave oral evidence. The Department is recorded as having been represented, but the presenting officer is not named and no questions by the presenting officer are recorded.
8. The tribunal declined to award points for daily living activity 1 (Preparing food), despite the Department accepting 2 points for activity 1.b on the basis of the supplementary advice note, finding that an aid was not necessary. It similarly disagreed with the Department's award of points under activity 4 (Washing and bathing) and activity 5 (Managing toilet needs), holding that an aid was not necessary for either activity. It did accept that she used a bed as an aid, awarding 2 points in respect of activity 6.b (Dressing) and accepted that points should be awarded for activity 9.b (Engaging with others). The tribunal further considered the mobility activities and accepted that points should be awarded under activity 1.b, while declining to accept the Department's assessment of 4

points for activity 2.b. As 6 points for daily living and 4 points for mobility fell below the relevant threshold, it disallowed the appeal.

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. 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.
13. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
14. 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.
15. The applicant submits that the tribunal has erred in law by making insufficient findings of fact and by placing weight on the lack of a diagnosis of a medical condition that would explain her symptoms. She indicates that since the tribunal hearing she has been diagnosed with Paget’s disease of the bone in her left hip and femur.
16. For his part, Mr Clements observed that the Department had accepted an award of points for activity 5.b on the basis of the HCP’s acceptance that the applicant relied on gripping a sink to rise from the toilet. He explained:
 - “5. The Department received a letter from [the applicant] on 5 July 2021. She explained in the letter that she needed to use the sink to help herself up after using the toilet due to issues with balance and dizziness. The Department subsequently determined that descriptor 5b applied to [the

applicant]. Descriptor 5b carries a score of 2 points and reads “*needs to use an aid or appliance to be able to manage toilet needs or incontinence.*”

6. The record of proceedings does not show the tribunal asking [the applicant] any questions about whether she needed to use the sink or any other aid for standing after getting up from the toilet. The tribunal also did not refer to [the applicant]’s evidence that she required the aid of the sink to stand in its statement of reasons. It did state the following in respect of aids for this activity:

“In reviewing the evidence relating to the Appellant’s physical and mental health the Tribunal was satisfied that the Appellant could achieve this activity unaided. The Department had awarded 2 points for use of an aid. The Tribunal did not agree that the medical evidence supported this assessment at the date of the Department’s decision and did not award any points.”

7. The definition of “toilet needs” in Part 1 of Schedule 1 to the Personal Independence Payment (Northern Ireland) Regulations 2016 includes getting on and off an unadapted toilet:

“toilet needs” means—

- (a) getting on and off an unadapted toilet;*
- (b) evacuating the bladder and bowel; and*
- (c) cleaning oneself afterwards*

The definition of an “aid or appliance” in regulation 2 of the same Regulations reads as follows:

“aid or appliance”—

- (a) means any device which improves, provides or replaces C’s impaired physical or mental function; and*
- (b) includes a prosthesis*

8. In a reported decision of the Upper Tribunal in Great Britain, *CW v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 197 (AAC); [2016]

AACR 44, Judge Jacobs accepted at [18] that an aid did not have to be specifically designed, made, or sold for the purpose of overcoming a limitation of function.

“I accept the Secretary of State’s submission, supporting Judge Mark’s reasoning: an aid does not have to be specifically designed, made or sold for the purpose. This accords with practical experience that people do make use of items that are available in their homes rather than obtain or use specialist aids. Whatever the purpose for which the item was designed or sold, it is being used as an aid.”

Judge Jacobs went on to hold at [31] that an “aid” that is normally used by a non-disabled person does not qualify as an “aid or appliance” for the purposes of the PIP activities as it is not assisting in overcoming the consequences of an impaired function.

“The question is this: would this “aid” usually or normally be used by someone without any limitation in carrying out this particular aspect of the activity? If it would, the “aid” is not assisting to overcome the consequences of an impaired function that is involved in the activity and its descriptors. So, using an ordinary wooden spoon to stir hot food while it is cooking is using an “aid” in the everyday sense of the word, but it would not assist in overcoming the consequences of any loss of function, because it would be used anyway. But if the spoon had a special handle for someone with poor grip, it would be an aid for the purposes of activity 1 (preparing food). Gripping is a function involved in cooking and the use of a handle that improves grip makes the spoon an aid.”

9. I submit that a sink is capable of constituting an aid or appliance for the purpose of daily living activity 5. As a sink is not typically used as an aid to get off an unadapted toilet by non-disabled people, it will be an “aid or appliance” if it is used in that manner by a disabled person to overcome the consequences of their impaired physical function(s).

10. It is not clear from the evidence in the papers when [the applicant] began to use the sink as an aid. Given that she reported a deterioration in her condition around May 2021, and that she first referred to needing to use the sink as an aid in a letter received by the Department on 5 July 2021, it may be the case that she did not need to use the sink as an aid at the time of the decision under appeal (the “required period condition” in sections 83(1)(b) and 86(1) of the Welfare Reform (Northern Ireland) Order 2015 may also be potentially relevant). However, the tribunal had the opportunity to investigate this matter further during the hearing and did not do so.
11. I submit that the tribunal’s failure to make any specific findings of fact on whether it was necessary for [the applicant] to use the sink as an aid at the time of the decision amounts to an error of law.”
17. While accepting that an error of law arose, Mr Clements observed that this would not be a material error in the sense that a further award of two points would not alter the outcome of the appeal. However, he further submitted that the tribunal had not made adequate findings in relation to activity 9. He queried whether the tribunal had addressed the question of whether the applicant required social support in order to engage with other people. He accepted that a possibility of an award of points for activity 9.c would establish an arguable error of law.
18. Mr Clements accepts a further argument in the applicant’s favour. He notes that:

“With respect to the tribunal’s approach to daily living activity 2, I would submit that it is entirely legitimate for the absence of an existing medical diagnosis to be taken account of as a part of the totality of the evidence before the tribunal. However, it is not axiomatic that the absence of a diagnosis means that a claimant will not meet the criteria of the point-scoring descriptors in a relevant activity. It is entirely possible that a claimant who has not been diagnosed with a recognised medical condition nonetheless suffers from a physical or mental condition which limits their ability to carry out certain daily living or mobility activities. Tribunals must therefore consider the absence of a diagnosis in the context of the rest of the evidence.

It is not apparent to me that the tribunal did so in the instant case. It stated that it was “*persuaded by the lack of identification of the problem that it was an Activity that the*

claimant could achieve unaided.” This indicates that the tribunal came to the conclusion that [the applicant] can take nutrition unaided primarily because no condition had been diagnosed which explained her episodes of choking. The only other factors mentioned in the statement of reasons are [the applicant]’s failure to mention her problems with choking at an earlier stage and the apparent lack of input from any professional regarding the issue. I also note that the record of proceedings does not show the tribunal asking [the applicant] if she ever required the use of an aid, assistance, etc. to take nutrition.

While I do not agree with [the applicant]’s submission that the proceedings were procedurally unfair, I submit that the tribunal has not given adequate reasons for its decision in respect of this activity. The absence of a diagnosed medical condition concerning [the applicant]’s episodes of choking cannot serve as the tribunal’s primary justification for why she can take nutrition unaided. When considered together with the errors I have previously identified, I submit this error was material to the outcome and therefore amounts to an error of law”.

19. It appears to me that there is force in the submissions made and that I should grant leave to appeal. In light of the fact that each of the parties agree that the tribunal has erred in law, I consider that this is an appropriate case in which to set aside the tribunal’s decision under Article 15(7) of the Social Security (NI) Order 1998, without a formal finding that the tribunal has erred in law.

(signed): O Stockman

Commissioner

18 May 2023s