

**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 31 March 2022

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

**This appeal by the claimant is allowed. The decision of the Tribunal sitting at Omagh on 31 March 2022, under Tribunal Number LD/6307/21/02D was in material error of law. I set it aside, and remake it as follows:**

**The appellant is awarded the standard rate of the daily living component of the Personal Independence Payment from 20 March 2021. It will run alongside her existing award of the standard rate of the mobility component, which is until 16 February 2024.**

**In addition to the 6 points already awarded by the Tribunal in respect of Activities 5b (2 points) and 9c (4 points) the appellant scores an additional 2 points under Activity 4c. The total is now 8 points.**

**REASONS**

**Background**

1. The appeal below concerned entitlement to a Personal Independence Payment (PIP) under the Personal Independence Payment Regulations (Northern Ireland) 2016 (hereafter “the PIP Regulations”).
2. The appellant had previously had a PIP award between 21 March 2018 and 20 March 2021. It is helpful to explain at this stage that decision-maker on that occasion had refused the PIP claim, and that the decision was then appealed to a Tribunal sitting at Strabane. On 6 June 2019, the Tribunal (the 2019 tribunal) made an award of the standard rate of both

components, awarding 8 points for daily living (4c; 5b; 6c; 9b, all 2 points), and 10 points for mobility (1e).

3. The appellant renewed her claim towards the end of that period, submitting her form on 24 February 2021. Following a disability assessment at a home visit by a healthcare professional (HCP) (a nurse), a decision was made on that renewal application on 24 March 2021. The decision-maker for the Department of Communities (hereafter “the Department”) accepted the opinion of the healthcare professional. An award was made of the mobility component at the standard rate, based upon 10 points under mobility activity ie (cannot undertake any journey because it would cause overwhelming psychological distress to the claimant). They awarded her a total of 4 points under activities 3a (ii), managing therapy or monitoring a health condition and 5b, managing toilet needs or incontinence, so the minimum of 8 points necessary for an award at the standard rate was not reached.
4. The mandatory consideration process followed. During this, the Department took further advice from a healthcare professional to the effect that the nurse’s assessment was justified, despite what the adviser was now told about the 2020 Tribunal award which had awarded more points than the 2019 HCP examination. The decision remained unchanged.
5. An appeal was lodged, and it came before the Tribunal sitting at Omagh on 31 March 2022. It was heard at an oral hearing before a legally qualified Chair, a medical doctor, and a member with experience of disability. At that hearing the appellant was assisted by a representative of Advice Northwest, Mr Sean O’Farrell, who did not challenge the mobility award, but argued that points should have been awarded for daily living difficulties under Activity 4, washing and bathing, Activity 6, dressing and undressing and Activity 9 engaging with other people.
6. The result was the continuation of the award of mobility, but, in common with the decision-maker, no award in respect of daily living difficulties. The Tribunal awarded 6 points, not enough to reach the threshold. These were 4 points for Activity 9 c, needs social support to be able to engage with other people, and 2 points for Activity 5b, needs to use an aid or an appliance to manage toilet needs or incontinence.
7. Following the issue of a statement of reasons, Mr O’Farrell applied for leave to appeal, first to the Tribunal Chair, and, following a refusal to the Commissioners.

### **Proceedings before the Commissioners**

8. There were some initial questions about whether the appeal had been submitted late, but these were resolved in the appellant’s favour, and it has proceeded by way of written submissions, and referral to me for the further conduct.

9. The assistance of Mr O'Farrell has continued before me. The Department is represented by Mr Clements. I am grateful to them both for their helpful submissions.
10. The Department supports the application for leave to appeal, and I grant that, there being some clearly arguable issues.
11. Both parties are content that I take the "rolled up" approach, and deal with the appeal itself now, on the submissions made in relation to leave. Mr Clements accepts certain of Mr O'Farrell's arguments and submits that the matter be remitted for a further hearing for a different tribunal. Mr O'Farrell's wish is that the matter be resolved more quickly by my making a decision, and after some thought that is the course I have taken. An advantage of that course, although not the reason I have adopted it, is that I am more free to make comment as to the evidence and how it was analysed by the Tribunal.
12. Neither party has requested an oral hearing and I do not think one is necessary in the interests of justice; I am able to decide the matter fairly on the papers before me.

### **The arguments of the parties**

#### **The appellant**

13. The grounds of appeal concerned
  - (i) the decision-making process of the Department, and in particular the apparent lack of knowledge of the 2019 Tribunal award by the healthcare professional who conducted the at home assessment in 2021;
  - (ii) too little reliance was placed on the evidence of the Trainee Cognitive Behaviour Therapist (the Therapist);
  - (iii) the Tribunal's reasons show that it took into account the appellant's care of her young child, which was impermissible given the date of birth of that child being just a day prior to the Departmental decision, and the legal provisions as to not taking matters that did not obtain at the date of the decision into account;
  - (iv) the reasoning as to the appellant's motivation to care for herself was much influenced by her perceived abilities to care for her child, and, accordingly, the decision was flawed.

#### **The respondent**

14. Mr Clements supports the appeal, although he doesn't accept all the points made by Mr O'Farrell.

15. He agrees with the submission concerning the taking into consideration of matters which existed only after the decision under appeal, against the prohibition in Article 13(8) of the Social Security (Northern Ireland) Order 1998. It is helpful to set that out here, as it will be referred to again.
  - (8) In deciding an appeal under this Article, an appeal tribunal –
    - (a) need not consider any issue that is not raised by the appeal; and
    - (b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.
16. Mr Clements identifies this as an error of law that may have made a material difference to the outcome, under the principles set out in a number of cases but deriving from 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.
17. He observes that the approach of the Tribunal to matters such as interpreting the other evidence must have been affected by it considering the appellant the primary carer of her child.
18. The appellant had lost a significant amount of weight as part of a planned pregnancy programme, and the Tribunal used her having the motivation to lose weight as militating against her lacking motivation to carry out activities of daily living such as self-care. As the Tribunal didn't seem to know whether prompting or other assistance led to her motivation to lose weight, the inference was improperly evidenced.
19. The Tribunal was of the view that the appellant's difficulties lay only in what it called the "phobic settings", that was, outside, and mainly where there were either height or bridges. That conclusion, Mr Clements argues was influenced by her being able to summon up the motivation to lose weight. He therefore supports the appeal on that basis also.
20. As to Mr O'Farrell's submissions in relation to the Tribunal's approach to the Therapist's evidence that having worked with the appellant he was "able to see first-hand how debilitating this anxiety disorder has been for her" Mr Clements is less supportive; he cites a decision of Mr Commissioner Stockman, *JMcD v Department for Communities* (PIP) [2019] NI Com 4 (*JMcD*) to support the proposition that the evidence was not so compelling that the Tribunal was bound to reach a particular conclusion in respect of needing help in relation to activities of daily living.
21. In so far as it may be being argued that the 2019 Tribunal award of points for certain activities of Daily Living compelled this Tribunal to do the same, he disagreed with that approach, even had it been established that the appellant's condition was unchanged: two reasonable tribunals might reach different decisions on the same evidence.

22. As to the concerns expressed as to inconsistency in the disability assessment, he observes that the comment about there being no change from the previous assessment would have been made without the assessor knowing that a Tribunal had disagreed with it, because the Department doesn't routinely share that information with the assessment provider Capita. The apparent inconsistency in relation to the award of 10 points for mobility, and nil for daily living despite there being "no change" was explained by the context; the mobility points were awarded for difficulties in what was described as "the phobic setting" and problems in that environment were well evidenced within the medical reports and letters.
23. As there were some material errors of law Mr Clements submitted that the matter should be reheard by a fresh tribunal.

### **The Appellant's final position**

24. Having read the submissions of the Department Mr O'Farrell acknowledged that there was a high degree of agreement. He had not been arguing that the 2021 Tribunal was bound in any sense by that of 2019; however, he said that the 2021 Tribunal should have explained why it differed. He added some further background to the position concerning the appellant's weight loss, which had been difficult to achieve albeit that she had a great deal of support in doing so. The driver appears to have been that a pregnancy was more likely if she was able to lose weight.
25. He asks me to substitute a decision that awards the standard rate of the daily living component, to run with the mobility award already made.

### **My approach**

26. Given the high level of agreement between the parties I need only briefly identify what I consider to be the legal errors to show how they might be avoided in future.
27. As the weight the Tribunal decides to give to a particular part of the evidence is entirely for the Tribunal (that is to say, it is not for me), I see this mainly as a reasons challenge. I remind myself of the considerable case law from both this jurisdiction and elsewhere as to the purpose of giving reasons, and the extent of the need to explain; in short, reasons do not need to be perfect; they need to be adequate: I approach my analysis on that basis.

### **The relevant PIP activities and definitions**

28. I do not need to set out the relevant activities and definitions from the PIP Regulations, as in this case nothing turns on the wording of them.
29. In my consideration of whether additional Activities apply, I bear in mind that under regulation 4(3) of the Personal Independence Payment

Regulations (Northern Ireland) 2016 I must assess the claimant's ability to carry out an activity or satisfy a descriptor only if she can do so safely, to an acceptable standard, repeatedly, and within a reasonable timeframe.

### **My analysis**

30. The appellant's case was that her generalised anxiety disorder and low mood affected many aspects of her daily life and impacted upon at least some of the PIP activities; that she did not just have difficulties when she needed to leave her home and travel somewhere else.
31. I note Mr O'Farrell's point about what seems to be an inconsistency in the HCP report, the award of 10 mobility points, but no points for daily living, in circumstances where it was being put forward by the HCP that the position hadn't changed. This, of course, didn't prevent the Tribunal from relying on the report either wholly or in part; it did, however, place a particular onus on the Tribunal to explain its approach to the report, whether it considered the potential internal conflict, and how that affected any reliance placed upon it.
32. In the early part of the statement of reasons it was explained that, prior to the hearing, the Tribunal had discussed the mobility component and found it was appropriately awarded; accordingly, it didn't take evidence specifically on mobility. Whilst I understand that from a busy Tribunal, it makes it difficult to understand why the appellant's contentions about her problems going out were accepted, whereas those in relation to difficulties in daily living activities were not: the acceptance of evidence in one context but not in another requires explanation; indeed, it requires more explanation than a wholesale acceptance or rejection of what is said.
33. The Tribunal found that the medical evidence (both from the General Practitioner (GP) and the Therapist) established that she had a "specific phobia disorder," and that it supported the mobility award. It sets out part of the Therapist's letter in the statement of reasons. That part refers to specific phobias which interfered with the appellant's daily life, and that impact was particularly acute in relation to her attending medical appointments and in the arrangements for the birth of her child, in early 2021; but the report talks also about other anxiety related problems and makes observations about their severity. In view of anxiety forming at least part of the basis of the difficulties claimed, it was necessary for the Tribunal to deal more fully with that report and the extent to which it assisted in its fact-finding in that area, or if it felt it didn't, why not. That is not to say that the Tribunal was bound to take a particular view about that evidence. The case of *JMcD* is helpfully cited by Mr Clements, and I respectfully agree with the comments of Mr Commissioner Stockman to that effect.
34. Other medical evidence before the Tribunal showed that generalised anxiety related problems pre-dated by some ten years a report written in 2015 (i.e circa 2005), and that there had been previous therapy, the last series of sessions taking place in 2016; further, Mr O'Farrell, in a

submission letter before the Tribunal, makes the point that the GP notes from the time of the pregnancy, and into early 2021, refer to increasing anxiety following cessation of the medication duloxetine (due to her pregnancy this was discontinued slowly, and replaced with sertraline). These matters cannot simply be ignored: what comes across from the statement of reasons is a “pick and mix” approach to the medical evidence, accepting some parts but not others; whilst that approach is legitimate, it carries with it an onus on the Tribunal to explain.

35. My last comment about the reasons is that, whilst a previous award doesn't raise a presumption of it being continued, a tribunal should explain why it is not renewing it unless it is abundantly clear from its reasons: *R(M) 1/96*, the point being reiterated in *Quinn v Department for Social Development* [2004] NICA 22.
36. I deal rather out of turn with a final point, one of the major planks in Mr O'Farrell's case, supported by Mr Clements, because it seems to me to be of particular importance.

#### **Restrictions on the consideration of evidence under article 13(8)(b)**

37. Art 13(8)(b) of the Social Security (NI) Order 1998 directs the Tribunal not to take into account circumstances that did not obtain (meaning in this context, exist) at the date of the decision under appeal; it may, however, take later evidence into account to shed a light on what the position was likely to have been at the relevant time, which is the statutory period prior to the decision: *BMcD v DSD (DLA)* [2011] NI Com 175; [2013] AACR 29, a decision of a Tribunal of Commissioners in Northern Ireland.
38. The Tribunal referred to the applicant being the primary carer for her child. I accept the general points made by Mr O'Farrell that inferences were being drawn from this when, other than technically, that was not the position at the date of the decision: the appellant's daughter, her first child, was born by emergency C-section only the day before the Department made the decision under appeal, and the appellant remained in hospital for some days. I don't agree, however, that this means the appellant's ability or otherwise in respect of her child's care has no bearing at all.
39. A Tribunal can infer the ability or motivation to self-care from behaviour after the decision, including how an appellant cares for her child. This was a difficult case in which to assess prior activities for a variety of reasons, including that one's abilities during the final months of pregnancy may also not be representative. The Tribunal needs to approach difficulties such as this with its usual common sense, and, importantly, explain its approach if reasons are requested. In recent times there have been difficulties assessing, for example, difficulties encountered engaging socially with other people, when social mixing was not taking place during the pandemic lockdowns, and perhaps more inferences were required from other behaviours or other periods to shed the necessary light. To explain the

circumstances and how the findings were made in the light of difficulties becomes the more important in such a case.

### **The evidence**

40. I will make one further general point here; reading the (albeit not verbatim) note of the evidence in conjunction with the reasons of the Tribunal, I was struck at what seemed to be the lack of curiosity about what lay behind the appellant's case that she needed significant help with the activities of daily living. Deciding on the extent of the evidence that it needs to elicit at a hearing is difficult: the balance must be drawn between questioning that appears to be a cross examination, and of asking so little that the evidential basis for findings is just not there.
41. Here, the case put forward was that the appellant's difficulties related not to physical problems, but to low motivation to perform tasks, such as getting dressed. It may have been helpful for the tribunal to consider asking about the history of this, whether there was any difference in the appellant's mood during her period of weight loss, how had her motivation to do that begun and been sustained during that process, and how her planned pregnancy affected her moods, her anxiety state and whether (and if so in what way) that changed after her baby was born.
42. I come onto the findings that I am able to make from the evidence before me, which has been added to slightly since the Tribunal hearing by what Mr O'Farrell has said in his submission.

### **My findings of fact**

43. The appellant suffers from debilitating mental health problems, including anxiety, depression and specific phobias. They began in childhood and have been treated by the medical profession since she was 11. She was 33 at the date of the Departments decision.
44. The impact on her life has been considerable. The practical difficulties of her phobic states have prevented her from getting from one side of the city to the other, because she cannot comfortably cross a bridge. This has affected her ability to attend appointments or to work. She has very few friends; she found it difficult to keep up with her cohort from school because either they didn't want to socialise within her limitations, or she felt they didn't.
45. Her specific phobias have been difficult to treat, but some improvement has occurred; after a course of Cognitive Behavioural Therapy (CBT) she felt more confident about using the stairs to get to the maternity facilities at the hospital, albeit with the help of a family member. Her difficulties are not confined to problems travelling outside the home but are present in it too.



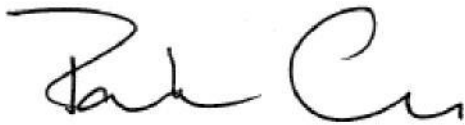
46. More generalised anxiety affects her day-to-day activities: she suffers from low mood and/or low motivation and relies a great deal on the support of her family, in particular her mother and her brother.
47. She requires assistance in the form of prompting to wash and dress herself regularly. Without this assistance she will stay in her pyjamas.
48. Whilst, no doubt, the birth of her child has brought her joy, she cannot care for her herself; she relies on family assistance for that too. I am not persuaded that inferences can be usefully drawn from any care that she does give her child to shed light on how she managed her own self-care during the relevant period prior to the Department's decision of 24 March 2021.

### **Reasons for the facts I have found**

49. A holistic reading of the medical evidence provides strong support for the existence of difficulties both inside and outside the home.
50. The extent of the problems and the length of time they have been affecting the appellant are clearly set out in a report from her GP surgery in 2015 which was commissioned by the Department in respect of a Disability Living Allowance (DLA) application. The anxiety disorder was said to have been present for some ten years. She was said to have problems answering the phone, and that her mood was "low especially since July 2015 when Selective Serotonin Reuptake Inhibitors (SSRI) changed. Unable to complete active CBT. Ongoing chronic daily symptoms worsened over the years". A question about self-care was answered "continued help, support and motivation required from friends and family to enable her to function."
51. Other than the two disability assessments for the respective PIP claims, there is no medical evidence to counteract that position, nor suggest improvement.
52. In the year prior to the Department's 2021 decision there were a number of major changes in the appellant's life. She lost some weight, about 21 lbs; she became pregnant, which she had very much wanted, and she had the baby. During this time, she also had significant changes to her medication, largely because of the pregnancy. Previous medication changes are recorded as having been difficult for the appellant to manage. The tenor of the GP notes during that period show extreme agitation and very frequent contact, often over quite small issues. She also had a medical complication of pregnancy, gestational diabetes.
53. In early 2021 there is a note on the GP file for a doctor to call her to speak about her mental health because she was pregnant and "not coping"; the notes record, in the context of her being then 29 weeks pregnant, a background of agoraphobia and severe anxiety worsening since medication was discontinued early in pregnancy; racing constant thoughts

that she will be unable to get up the stairs to the maternity unit, trying a few weeks ago it had taken over 2 hours and several members of staff to get up the staircase, and she took diazepam twice but felt it was not helping. It was in these circumstances she was referred for CBT.

54. The level of her Specific Phobia Disorder and the impact on her birth plan led to a quick course of that therapy. The Therapist wrote a letter about his involvement, which was over a four-month period between January and April 2021. (It will be recalled that the baby was born on 21 March 2021.)
55. The letter detailed the specific phobia issues, but also addressed the more general difficulties which had been adumbrated in the other medical evidence. It was open to me, and I did, interpret the totality of the medical evidence as supporting there being problems in the performance-safely, to an acceptable standard, repeatedly, and within a reasonable timeframe-of the appellants activities of daily living, and I have awarded the additional points set out accordingly. I do not need to consider any further activities, having reached sufficient points for the award of the standard rate that Mr O'Farrell seeks.

A handwritten signature in black ink, appearing to read 'P Gray', written in a cursive style.

(signed): P Gray

Deputy Commissioner (NI)

26 June 2023