

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 28 March 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 BE/8359/21/02/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 matter 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 24 April 2018 and was awarded the standard rate of the daily living component to 2 August 2021. She requested a supersession by telephone on 29 March 2021. She completed a PIP AR1 review form, indicating needs arising from Crohn's disease, depression, anxiety, migraines and asthma and returned this to the Department on 7 May 2021 along with further evidence. The appellant was asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 6 July 2021. The appellant provided further evidence and the Department obtained a supplementary advice note from a HCP. On 3 August 2021, the Department superseded the existing award of standard rate daily living component from 3 August 2021 to 5 July 2025. The

appellant requested a reconsideration of the decision. She was notified that the decision had been reconsidered by the Department but not revised. She appealed.

4. The appeal was considered at a hearing on 28 March 2022 by way of a video conference by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal, maintaining the award of the standard rate of the daily living component, but reducing the duration of the award to a two year period to 2 August 2023. The appellant then requested a statement of reasons for the tribunal's decision, and this was issued on 26 May 2022. The appellant applied to the LQM to set aside the decision of the appeal tribunal but setting aside was refused on 21 September 2022. At the same time her correspondence was treated as an application for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 21 September 2022. On 3 October 2022, the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The appellant, represented by Mr Nicholas Trimble, submits that the tribunal has erred in law by:
 - (i) failing to give a statement of reasons in respect of mobility activities;
 - (ii) making an unreasonable decision on the evidence relating to daily living activity 9 (Engaging with others);
 - (iii) making an unreasonable decision on the evidence relating to daily living activity 10 (Making budgeting decisions).
6. The Department was invited to make observations on the appellant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted 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. V From this I can see that the tribunal had documentary material before it, consisting of the Department's submission, containing the AR1 questionnaire completed by the appellant, further evidence, a telephone consultation report from the HCP, further evidence, a supplementary HCP advice note, more evidence and evidence from previous claims. The tribunal had access to the appellant's medical records. The appellant attended, accompanied by her mother, and both gave oral evidence. The Department was not represented. Whereas the appellant expressly disputed two daily living activities, namely activity 2 (Taking nutrition) and

activity 5 (Managing toilet needs), the tribunal indicated that it would enquire about all relevant activities.

8. The tribunal addressed all the evidence and the medical evidence in particular. On the basis of that evidence, it disagreed with the Department in some respects. It removed points for three activities accepted by the Department (Managing medication, Engaging with others and Managing budgeting decisions), and awarded points for one activity that the Department had not accepted (Managing toilet needs). The appellant scored 8 points, as opposed to 11 points as previously, and the tribunal awarded the standard rate daily living component. The tribunal further time limited the duration of the award in anticipation of possible changes in the appellant's condition.

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 appellants 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 appellant, as indicated above, advanced three grounds. Firstly, she submitted that the tribunal failed to give a statement of reasons in respect of the mobility activities. Secondly, she submitted that the tribunal failed to engage with the evidence and made an unreasonable decision relating to daily living activity 9 (Engaging with others). Thirdly, she submitted that

it again failed to engage with the evidence and made an unreasonable decision relating to daily living activity 10 (Making budgeting decisions).

16. Mr Killeen for the Department addressed the appellant's grounds. He noted that the record of proceedings addressed aspects of the mobility activities, and the issue of driving in particular. He observed that there was no indication that the appellant had accepted the Department's assessment on mobility. On the basis that there was no indication of the tribunal's reasons for refusing to award points for the mobility activities, he indicated that he supported the application. However, he did not accept that the tribunal had incorrectly engaged with the evidence in relation to disputed daily living activities 9 and 10.
17. Mr Killeen further referred to an issue that was not initially apparent from the record of proceedings. He noted correspondence from Robbie Butler MLA to the Appeals Service concerning a problem with the video connection, stating that one of the panel members had dropped off the call. In response, the record of proceedings had been amended to indicate that a member had dropped off the call at 11.02. v Correspondence to Mr Butler indicated that the absence of the member lasted only for 2-3 minutes. The tribunal was recorded as having concluded at 11.15. Mr Killeen indicated that he had written to the Appeals Service about this issue and received a response that indicated that "a legal member would not conduct a hearing in the absence of a panel member when a technical difficulty has arisen and a hearing would not proceed in such circumstances".
18. Referring to the decision of Chief Commissioner Mullan in C28/09-10(DLA), Mr Killeen noted that the Chief Commissioner had required that "any interaction, intervention or action which relates to an appeal tribunal session or oral hearing of an individual appeal, should be accurately recorded in the ROPs for the appeal tribunal hearing or otherwise noted by the clerk to the appeal tribunal in a session report...". 'ROPs' is an abbreviation for record of proceedings. Mr Killeen observed that it was not indicated when or if the relevant panel member had re-joined the hearing and was able to provide input to the determination. He submitted that – while he would normally assume that an LQM would not proceed or determine an appeal in the absence of another panel member - given the circumstances of the current case, the LQM should have provided some indication that the panel member had re-joined and was able to provide input to the tribunal's decision. In light of Mr Killeen's support for the application on these grounds, I grant leave to appeal.
19. The matter on which the Department is in agreement with the appellant, namely the absence of the tribunal's reasons for its decision on the mobility activities, and the further matter Mr Killeen raised, namely the incomplete record relating to the absence of the panel member who dropped off the call, are entirely procedural. That does not mean that they are not significant matters.

20. Whereas the tribunal indicated at paragraph 10 in its statement of reasons, that mobility activity 2 (Moving around) was not disputed by the appellant, the appellant contends that it was. Whichever account may be correct, in any event, the appellant had indicated and the tribunal recorded at paragraph 1 of the statement of reasons that mobility activity 1 (Planning and following a journey) was in dispute. Nevertheless, the tribunal has not given reasons in relation to its decision in relation to mobility activity 1. This would generally be sufficient to give rise to an error of law, albeit that it might not be a material error if it was unlikely to alter the overall decision.
21. Nevertheless, I am reinforced in this conclusion by my own observation, that the version of the relevant activity in the legislation placed before the tribunal was incorrect. The version of the legislation given to the tribunal was that in force between 20 April 2017 and 15 June 2018. Material differences appear in the legislation relevant to the appellant's supersession application dated 29 March 2021. In the absence of reasons for mobility activity 1 and in the face of incorrect legislation being placed before the tribunal in the Department's submission, I consider that I must hold the tribunal's decision to be in error of law.
22. Further, the Covid-19 pandemic has led to greater use of Internet-based communications and online hearings. However, where panel members are accessing tribunals remotely, that fact places reliance on their personal Internet connection, whether in an office or domestic setting. This in turn can lead to the unfortunate situation where a panel member or a party is disconnected from the proceedings for a time. The record of proceedings in this case, as I understand it, did not initially record the fact that a panel member dropped off. When raised, it was amended to note that fact. However, it did not also record that the panel member subsequently re-joined and after what period of time.
23. I consider that Mr Killeen is correct to point to the decision of Chief Commissioner Mullan referenced above. Whereas that decision does not address the particular situation that arises in the present case, it is not a wild extrapolation to suggest that, on a remote tribunal hearing, any technical problem that alters the composition of the panel or the presence of a party or their representative should be recorded. The absence of a member affects the composition of the tribunal that is mandated by the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999. The absence of a party or representative affects the fairness of the proceedings under Article 6 of the European Convention on Human Rights. Therefore, the fact of a participant dropping off alters the lawfulness of the hearing.
24. It may be reasonable to assume that the tribunal would not proceed to decide an appeal when incorrectly constituted. However, it is such a fundamental matter, that I consider it is necessary for an LQM to record the relevant circumstances of any disconnection from, and reconnection to, a hearing. In particular, the duration of the absence and the fact of reconnection should be recorded. As the record of proceedings in the

present case does not record that detail sufficiently to reassure that the hearing had been conducted in compliance with legal requirements, I consider that the tribunal has erred in law for that reason.

25. As I have allowed the appeal on other grounds, I shall not engage with the appellant's remaining grounds.
26. I set aside the decision of the appeal tribunal. I refer the matter to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

23 January 2023