

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 18 July 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/4569/20/03/D.
2. An oral hearing of the application has been requested. However, I consider that the application can properly be determined without an oral hearing.
3. For the reasons I give below, I grant leave to appeal. I allow the appeal under Article 15(8)(b) of the Social Security (NI) Order 1998. I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.

REASONS

Background

4. The applicant had previously been awarded disability living allowance (DLA) from 15 May 2002, most recently at the low rate of the mobility component and the middle rate of the care component. As her award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, she claimed personal independence payment (PIP) from the Department for Communities (the Department) from 15 May 2018 on the basis of needs arising from anxiety, depression, high blood pressure, irritable bowel syndrome (IBS) and back pain.

5. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 4 June 2018. She asked for evidence relating to her previous DLA claim to be considered. The applicant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 2 July 2018. On 19 July 2018 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 15 May 2018. The applicant requested a reconsideration of the decision. She was notified that the decision had been reconsidered by the Department but not revised. She appealed.
6. The appeal was first determined on 10 March 2020. However, the decision of that tribunal was set aside on 26 November 2020 by the salaried LQM in the interests of justice. The appeal was again considered at a hearing on 18 July 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 7 December 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 20 April 2023. On 11 May 2023 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

7. The applicant submits that the tribunal has erred in law by failing to consider her full medical history, setting out the background to her medical conditions. She submitted that the medical records she had sent to the tribunal had been mislaid.
8. The Department was invited to make observations on the applicant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted that the tribunal had erred in law. He indicated that the Department supported the application.

The tribunal's decision

9. 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, including the PIP2 questionnaire completed by the applicant, a general practitioner factual report relating to DLA and a consultation report from the HCP. It also had records of previous hearings. The applicant did not attend the hearing. The tribunal was told that the applicant had not returned an AT6 form. The previous history of the case was discussed, and the panel decided to proceed in the applicant's absence.
10. The tribunal accepted that the applicant suffered from anxiety and depression, high blood pressure, irritable bowel syndrome and back pain. It considered each of the activities. It considered what was said in the PIP2

questionnaire, but in so far as there was any conflict, placed more weight on the assessment of the HCP, considering it to be fair and reasonable based on examination, observations, and the record of the applicant's own responses. This resulted in an award of no points for daily living or mobility activities. The appeal was therefore disallowed.

Relevant legislation

11. 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.
12. 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.
13. 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

14. 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.
15. 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.
16. 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.
17. In her prospective grounds of appeal, the applicant made submissions of fact related to her medical conditions and resulting difficulties. However, these submissions of fact do not amount to submissions of error of law. Mr Killeen for the Department cites Chief Commissioner Mullan in C4/10-11(ESA) at paragraph 25, where he said:

“The appellant’s application for leave to appeal to the Social Security Commissioner amounts to a further submission on factual issues rather than questions of law. It is clear that an appeal on a question of law should not be permitted to become a re-hearing or further assessment of the evidence, when that assessment has already been fully and thoroughly undertaken”.

18. I agree with the statement of principle set out by Chief Commissioner Mullan. The Commissioner does not have jurisdiction to re-hear or reassess the evidence accepted by a tribunal, unless it is first established that the tribunal has erred in law. Whereas the applicant was not present at her tribunal hearing, and understandably wishes to present submissions of fact that have not previously been aired by her, this is not the forum for that.
19. The applicant has further submitted that she sent her medical records to the Appeals Service but that they had been mislaid.
20. I observe from the file that the case appears to have been first listed for hearing on 28 May 2019. The applicant applied for a postponement on 14 May 2019 on the grounds that she was getting her medical notes and it would take 28 days as “they are put on disc, and I have only received letters”. Postponement was granted on 23 May 2019.
21. The case next appears to have been listed for hearing on 13 September 2019. The applicant made a further postponement application on 24 August 2019 stating, “I am having surgery and will not be recovered from it to attend and I enclose my medical notes disc”. Postponement was granted on 11 September 2019.
22. The case next appears to have been listed for hearing on 11 November 2019. The applicant again made a postponement application. She stated “I am still recovering form surgery. Also need my disc printed as you sent [it] back to me. I will get someone to print the notes as I cannot do myself”. A further postponement was granted on 13 November 2019.
23. The case was next listed for hearing on 10 March 2020. The applicant sought postponement. She stated “I have had two surgeries in two months waiting on stitches coming out. Unable to attend as not able to move freely on pain medication”. On 6 March 2020 an LQM refused the postponement application and directed the applicant to provide the panel with medical notes.
24. As indicated above, the appeal was determined on 10 March 2020 in the absence of the applicant and her medical records. However, the decision of that tribunal was set aside on 26 November 2020 by the salaried LQM in the interests of justice. This determination followed the submission of evidence by the applicant of her surgery in January and February 2020, along with her statement that she had sent her medical records to the Appeals Service.
25. The appeal was next listed for hearing on 4 June 2021. On 23 May 2021 the applicant requested a postponement on the basis that she was unable to travel to the hearing venue (which I observe was over 32 miles from her home), observing that “it is all on my medical notes”, that she was now 68 and wished to wait until a venue closer to her home was available.

Postponement was granted on 2 June 2021. The hearing was next listed on 18 July 2022 at a different venue some 18 miles from the applicant's home. It does not appear that she made a postponement request. Nor did she return the AT6 form that indicates whether or not she would be attending the hearing. The tribunal proceeded in her absence, and it appears, in the absence of her medical notes.

26. The applicant had – as indicated above – previously sent her medical records to the Appeals Service in a digital form on compact disc. These had been returned with the instruction to have them printed. She stated in her letter asking for the decision of 10 March 2020 to be set aside, “First of all my medical notes were sent in when CD returned. I brought them to be printed. I waited as they were done. Then I posted as asked.”
27. For the Department, Mr Killeen accepts that the applicant believed that her medical records were with the Appeals Service. The Appeals Service first indicated that it did not have her records in a letter dated 7 October 2022. That letter refers to a hearing options letter returned by the applicant (dated 20 December 2020) that contains the statement “you have all my information on medical notes”. Therefore, there were two communications to the Appeals Service – 20 December 2020 and 23 May 2021 - that clearly indicated the applicant's belief that she had provided her medical records to the tribunal. The Appeals Service did not indicate that they did not hold the applicant's medical records and thereby correct the misapprehension.
28. Mr Killeen refers to my decision in *DJS v Department for Communities* [2021] NI Com 22. He supports the application on the basis that the tribunal has arguably misunderstood the facts of the case and submits that it has erred on this basis.
29. For my part, I note that an LQM had directed the applicant to provide her medical records. She submits that she had initially done this on a CD-ROM but was told that the Appeals Service would not print from this and that it was returned. She then refers to taking it to be printed and waiting for them to be done, and then sending them to the Appeals Service. I have no reason to disbelieve that they were sent. However, I also accept that they were not received.
30. The Appeals Service had received two statements from the applicant that indicated that she understood that the medical records were in its possession. These statements post-dated the direction of 6 March 2020 to provide medical records. I find it problematic that the Appeal Service did not seek to communicate with the applicant at that stage to tell her that it did not have her medical records.
31. I also consider that the tribunal should have been aware that the applicant believed that she had complied with the direction of 6 March 2020. However, it made no reference to that direction when proceeding to determine the appeal. As I have indicated previously, a direction cannot simply be ignored. If a differently constituted panel, or different LQM, does

not consider that a direction needs to be complied with, then it should amend or set aside that direction before proceeding.

32. It is long established that the grounds of setting aside and the grounds of error of law overlap to some extent. A decision can be set aside on the grounds that a document relating to the proceedings was not received by a party or decision maker under regulation 57(1)(a) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999. While this is an application based on error of law, the fact that documents relating to the proceedings were not before the tribunal which contained material evidence gives rise, in my view, to a procedural unfairness amounting to an error of law. I grant leave to appeal on that ground. I allow the appeal and I set aside the decision of the appeal tribunal.
33. I direct that the appeal shall be determined by a newly constituted tribunal. The new tribunal shall permit the applicant a further opportunity to provide a copy of her medical records.

(signed): O Stockman

Commissioner

30 October 2023