

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 4 February 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/7621/18/03/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 appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The appellant had previously been awarded disability living allowance (DLA) from 24 September 2010, most recently at the high rate of the mobility component and the middle rate of the care component. As his award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, he claimed personal independence payment (PIP) from the Department for Communities (the Department) from 22 February 2018 on the basis of needs arising from high blood pressure, high cholesterol, type 2 diabetes, and rheumatoid arthritis.
4. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 4 April 2018. He asked for evidence relating to his previous DLA claim to be considered.

The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 26 June 2018. On 4 July 2018, the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 22 February 2018. The appellant requested a reconsideration of the decision. He was notified that the decision had been reconsidered by the Department but not revised. He appealed.

5. The appeal was considered at a hearing on 4 February 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 appellant then requested a statement of reasons for the tribunal's decision, and this was issued on 18 August 2022. The appellant 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 15 September 2022. On 11 October 2022, the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant submits that the tribunal has erred in law by:
 - (i) basing its decision on a flawed HCP assessment;
 - (ii) because he had medically retired on the basis of his disability;
 - (iii) because his condition had worsened since he was first awarded benefit.
7. The Department was invited to make observations on the appellant's grounds. Mrs O'Higgins of Decision Making Services (DMS) responded on behalf of the Department. Mrs O'Higgins submitted that the tribunal had materially erred in law. She indicated that the Department supported the application.

The tribunal's decision

8. 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, notice of appeal, a GP report relating to DLA, the PIP2 questionnaire completed by the appellant, a consultation report from the HCP, decision notices, and medical evidence from the appellant's GP, occupational therapist, and rheumatology consultant. The appellant did not attend the hearing, having waived his right to attend. The Department was not represented, despite being directed to attend at a previous adjourned hearing.
9. The tribunal proceeded to address the documentary evidence and applied the evidence to the various activity descriptors. It accepted that points should be awarded for three daily living descriptors – namely Preparing

food 1(b), Washing/bathing 4(b) and Dressing/undressing 6(b), totalling 6 points. It awarded no points for mobility activities. As this was below the relevant threshold, it therefore disallowed the appeal.

Relevant legislation

10. 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.
11. 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.
12. 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

13. 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.
14. 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.
15. 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.
16. The grounds advanced by the appellant challenged the HCP assessment, relied on the circumstance that he had medically retired on the basis of his disability and made the assertion that his condition had worsened since he was first awarded benefit.
17. Mrs O’Higgins for the Department did not agree that the tribunal erred in law by placing reliance on the evidence of the HCP. She observed in particular that it had stated (at paragraph 17 of its statement of reasons):

“Given the issues raised by the Appellant regarding the HCP assessment, the Panel placed limited weight upon it whilst considering the case and relied more upon the medical records provided by the Appellant, and the contents of his correspondence”.

18. It appears to me from this statement that the tribunal did not accept the HCP report in an unqualified manner, but rather took the appellant's challenge to the contents of the HCP report at face value. Rather than place weight on the HCP report, it addressed the appellant's own statements in his written correspondence and placed weight on the content of his medical records. Therefore, I do not consider that there is merit in this ground.
19. The appellant made very general and somewhat rhetorical points, arising from the fact of his medical retirement with a degenerative condition, that were not focused on the tribunal's approach to any particular descriptors. However, in the appellant's interests, Mrs O'Higgins has addressed specific activities directly. She observed that the tribunal accepted that the deformity of the appellant's hands would require use of an aid in activity 1 (Preparing food) but submitted that it was inconsistent to then not award points for activity 2 (Taking nutrition) in light of the appellant's stated difficulties with cutting up food. She submitted that this lack of consistency amounted to an error of law.
20. Mrs O'Higgins further observed that the tribunal appeared to accept evidence that the appellant's medication was arranged for him in a dosette box, which amounted to an aid in relation to activity 3 (Managing medication). She submitted that the tribunal's failure to award points for requiring the use of an aid to perform this activity amounted to an error of law. I agree with this analysis, observing paragraph 12 of Chief Commissioner Mullan's decision in *FD v Department for Communities* [2018] NI Com 24 to the effect that a dosette box constitutes an aid.
21. Mrs O'Higgins further observed that the tribunal had found that the appellant had stated no issue with activity 5 (Managing toilet needs) "other than using a support to get on and off the toilet". She submitted that the tribunal had not investigated the use of support fully. The tribunal had found that the appellant's back pain did not appear to cause him any "unmanageable" pain or significant restriction. It appears to me that there is no need for pain to be unmanageable before use of an aid may be reasonable. Use of an aid to avoid even a moderate degree of pain on getting on or off a toilet may be necessary for a claimant to perform the activity to an acceptable standard for the purposes of regulation 4(3) above. Therefore, I accept that there is merit in the Department's submission. In light of the submissions regarding the daily living activities, I consider that a material error of law is demonstrated. I grant leave to appeal.
22. Mrs O'Higgins has questioned the tribunal's approach to the evidence concerning mobility activity 2. She further points out that a previous LQM had directed the attendance of a presenting officer. Whereas no presenting officer attended the hearing, she submits that the tribunal should have addressed the issue of non-compliance with the direction and that its failure to do so also amounted to an error of law. I will not address the issue of mobility component, as it is not necessary for me to do so.

However, I will briefly address the submissions of the Department on the issue of the previous LQM's direction for a presenting officer to attend the hearing on the next date.

23. As I stated in *RH v Department for Communities* [2022] NI Com 8, a direction is given by an LQM under the power in regulation 38(2) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999. Such a direction may be given for the “just, effective and efficient” conduct of the proceedings and may include a direction to a party to provide particulars or documents. Directions are formal orders of the tribunal and are intended to have legal effect. Non-compliance with a direction on the part of an appellant can result in an appeal being struck out under regulation 46(1)(c). Therefore, it can be taken that directions are to be obeyed. While there is no punitive sanction, such as striking out, that can effectively be employed against the Department, I would equally expect it to respect a direction. I have not heard argument on this issue, but I consider it evident that a direction, once made, should be complied with.
24. Where a direction is given by one LQM in the course of proceedings, and a different LQM has responsibility for a later stage in proceedings, it is entirely possible that the second LQM will disagree on the need for the direction to have been given in the first place. In such a case, I consider that there has to be an implied power on the part of the second LQM to amend or to set aside the direction. This is because one LQM cannot bind another. An alternative implication is that the first LQM has to be considered seized of the proceedings until they are determined, to the exclusion of all other LQMs. However, that is not a particularly efficient proposition, and would appear to undermine the purpose of regulation 38(2).
25. On this basis, I consider that the direction for the presenting officer to attend should either have been complied with, amended, or set aside. However, it appears that this is not what happened here. There is no indication of amendment or setting aside of the direction, or any consideration of the direction at all. The implication is that the direction of the previous LQM for a presenting officer to attend the hearing was ignored by the tribunal. In my judgment, a direction cannot simply be ignored. A failure to comply with a direction - by definition - will affect the just, effective and efficient conduct of the proceedings, since it can only have been given in compliance with the requirements of regulation 38(2). It may go to the fairness of the proceedings where an expectation is created for a party that the hearing will take a particular course, but then it does not follow that course. However, I have not heard argument and I consider that I do not need to reach a concluded view on this particular issue in these proceedings.
26. I allow the appeal on the grounds identified by Mrs O'Higgins in relation to the daily living activities. I set aside the decision of the appeal tribunal and I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

25 January 2023