

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Application by the above-named claimant for leave to appeal to a Social Security Commissioner on a question of law from a tribunal's decision dated 24 October 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I give leave to appeal and allow the appeal. The appellant's appeal against the Department's decision dated 2 December 2022 is remitted to a panel of the Appeal Tribunal, which must be entirely differently constituted.
2. By its decision dated 24 October 2023, the Appeal Tribunal had awarded 11 points for the Daily Living component and 10 for the Mobility component, with the consequence that the appellant was entitled to an award of each component at the standard rate. Her award of the Mobility component had previously been at the enhanced rate, but was reduced by the tribunal, having given the appellant frequent careful warnings.
3. The award for the Daily Living component included 2 points for Activity 5 (Managing toilet needs or incontinence), on the basis that the appellant needed an "aid or appliance" to assist with that activity.
4. The appellant, initially acting in person, sought leave to appeal. The issues she raised were wide-ranging, principally criticising the adequacy of the tribunal's reasons.
5. In the usual way, the observations of the Department were invited and these were provided by Mr Killeen, who at that stage opposed the grant of leave.
6. This resulted in further submissions from the parties. In relation to at least some of those submissions, the appellant was assisted by Law Centre NI.

7. At the end of the exchange of submissions, Mr Killeen modified the Department's position to accept that the decision of the Appeal Tribunal had been in error of law in its treatment of activity 5.
8. The descriptors for that activity are as follows:
 - a. Can manage toilet needs or incontinence unaided. 0
 - b. Needs to use an aid or appliance to be able to manage toilet needs or incontinence. 2
 - c. Needs supervision or prompting to be able to manage toilet needs. 2
 - d. Needs assistance to be able to manage toilet needs. 4
 - e. Needs assistance to be able to manage incontinence of either bladder or bowel. 6
 - f. Needs assistance to be able to manage incontinence of both bladder and bowel. 8
9. Regulation 4(3) of the Personal Independence Payment Regulations (Northern Ireland) 2016 provides:

“(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.”

(“C” refers to a person claiming personal independence payment).
10. If the appellant could have brought her case within descriptor (d) or (e), the additional points would have meant that she was entitled to the enhanced rate of the Daily Living component.
11. The Appeal Tribunal accepted that the appellant has an ileostomy, a lower back problem and a hernia. It noted that she had told the Healthcare Professional that she could not change the stoma bag herself as she could not stand for longer than 2 to 3 minutes and the hernia obstructed the view. Her son would help to change the bag if it leaked and if he was not at home, she would wait with a towel over the ileostomy.

12. The Appeal Tribunal contrasted this evidence with what it regarded as “a lower level of help required with regard to changing the stoma bag in December of 2022”, citing the appellant’s evidence that “if things were going well once a day she would need help”.
13. It went on to find that “while the appellant has a lower back problem she could achieve this activity [i.e. changing the stoma bag] while seated. Being seated would also avoid bending forward, and therefore avoid the problem with the hernias potentially obstructing the view while undertaking this activity.”
14. The appellant criticises, in trenchant terms, the tribunal’s view that it is possible to empty a stoma bag while sitting down. For that view in itself to be an error of law, it would have to be one which no reasonable tribunal could reach: a high hurdle.
15. Mr Killeen, in support of the grounds on which he now supports the application, has provided a booklet published by Colostomy UK entitled “*Caring for a person with a stoma: A practical guide for staff in nursing and residential homes and for home carers*”. This indicates, among other things that “a bag can be changed when the ostomate [meaning the person with the stoma] is sitting down but sitting down can cause the skin to crease and fold, making it trickier to get a good seal between the skin and the baseplate or adhesive flange”. The same guidance also indicates that “an ileostomy is more active than a colostomy, functioning three to six times a day and the output is looser”.
16. The Appeal Tribunal is a tribunal with specialist membership in the form of medically and disability qualified panel members. I would require more than the material presently before me to persuade me that its conclusion that a bag could be changed sitting down was one that no reasonable tribunal could reach.
17. Mr Killeen however supports the appeal on a different ground, namely that the tribunal failed in its inquisitorial duty. If the appellant needed help once a day “when things were going well” it raises the question of how often things “went well” and how she managed on the instances when things were not “going well”. There is no indication that the tribunal asked about this and certainly no findings on it. I would allow the appeal on this ground.
18. Informed by the material from Colostomy UK, Mr Killeen also submits, correctly in my view, that as the tribunal was required by reg 4(3) to consider whether the activity could be performed “to an acceptable standard” that was apt to include whether it could be performed in a manner with no leakage (or, as I would prefer to put it, so that a good seal could be achieved). While the tribunal directed itself as to reg 4(3) across all activities, I consider that if its view was that the bag could be changed to a reasonable standard while seated, it needed to explain its reasons for that conclusion, but it did not. I thus allow the appeal for this reason also.

In the particular circumstances of this case, bearing in mind the appellant's physique and various disabilities, it would have been prudent (and would have assisted with the formulation of reasons) to have put to her the tribunal's provisional view that the bag could be changed with her sitting down.

19. Mr Killeen has indicated that his observations on the application may be treated as the Department's observations on the appeal if a Commissioner were to grant leave to appeal.
20. In view of the conclusion I have reached on activity 5, it is not necessary to consider the other points raised. The appellant will have the chance to put her case to a fresh panel of the Appeal Tribunal. Although she requested a hearing before the Commissioner, her purpose was so that she could make representations as to her health condition; that will better be done to the Appeal Tribunal as the function of the Commissioner is primarily to decide appeals on point of law. I assume therefore that she will seek an in-person oral hearing before the Appeal Tribunal. The Appeal Tribunal went to considerable lengths to encourage her to seek representation in connection with her appeal to it and I repeat that encouragement. She will by now be well aware of the range of powers available to an Appeal Tribunal, including to reduce the award that is under appeal to it.



(Signed): C G WARD

DEPUTY COMMISSIONER (NI)

28 October 2024