

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Appeal to a Social Security Commissioner by the Department
on a question of law from a Tribunal's decision
dated 9 February 2024

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is the Department's appeal from the decision of an appeal tribunal with reference MT/1932/23/02/D.
2. For the reasons I give below, I allow the appeal under Article 15(8)(a)(i) of the Social Security (NI) Order 1998 and I give the decision I consider the tribunal should have given without making fresh or further findings of fact.
3. I decide that the respondent is entitled to the enhanced rate of the daily living component and the enhanced rate of the mobility component backdated for the period from 23 May 2022 to 14 September 2022 inclusive.

REASONS

Background

4. The respondent had previously been awarded personal independence payment (PIP) by the Department for Communities (the Department) from 2 September 2020 to 11 November 2023 at the standard rate of the daily living component and the standard rate of the mobility component. On 15 September 2022 the respondent sought a supersession of his award on the basis of a change in circumstances in respect of his needs arising from a broken tibia, depression, anxiety and arthritis. He was asked to complete an AR1 form to describe the effects of his disability and returned this to the Department on 16 November 2022 along with further evidence. The Department obtained evidence from his general practitioner (GP) on 23 January 2023 and 4 April 2023. The respondent was asked to participate

in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 7 April 2023. On 17 April 2023 the Department decided that the respondent satisfied the conditions of entitlement to PIP at the enhanced rate of the daily living component and the enhanced rate of the mobility component from 15 September 2022 to 6 April 2027. The respondent 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 7 March 2024 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal allowed the appeal, maintaining the Departmental award but backdating it to 23 February 2022. The Department then requested a statement of reasons for the tribunal's decision and this was issued on 11 March 2024. The Department applied to the LQM for leave to appeal from the decision of the appeal tribunal and leave to appeal was granted by a determination issued on 6 June 2024. On 11 June 2024 the Department duly appealed to the Social Security Commissioner.

Grounds

6. Leave to appeal was granted by the LQM on the ground that the tribunal arguably erred in law by failing to consider the required period condition and could only award from a period three months after 23 February 2022.
7. The Department, represented by Mr Clements, submitted its appeal on this ground – namely that the tribunal failed to consider the required period condition for entitlement to the enhanced rate of daily living and mobility components of PIP. Mr Clements further submitted an application for leave to appeal on the basis that the tribunal failed to make a determination as to whether it was reasonable to grant an extension of time for the respondent to notify the Department of the deterioration in his health.
8. The respondent was invited to make observations on the Department's grounds. He did not respond.

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, containing the AR1 questionnaire completed by the respondent, a GP letter and print-out medical records extract, a report from the HCP following a telephone consultation, and evidence from previous PIP claims. The tribunal had further extracts from the GP records and an email from the respondent dated 12 October 2023. The respondent had asked the tribunal to proceed in his absence and did not attend. The Department was represented, but the presenting officer's name is not recorded.

10. The tribunal noted that the only issue in dispute was the backdating of the enhanced rate of the daily living and mobility components. A change of circumstances had been reported on 15 September 2022 and the Department had accepted that the enhanced rate should be paid from that date. The tribunal considered the regulations that permitted backdating to an earlier date in special circumstances. It found that the state of the respondent's mental health amounted to special circumstances that justified his failure to report a change of circumstances earlier. It judged that 23 February 2022 – which it described as the date of a tibial fracture - was an appropriate date from which an increased award should take effect and allowed the appeal accordingly.

Relevant legislation

11. PIP was established by article 82 of the Welfare Reform (NI) Order 2015 (the Welfare Reform Order). 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. A condition of entitlement relevant to the present appeal is the required period condition. This can be seen in the context of the daily living component at Article 83 of the Welfare Reform Order. Parallel provision is made by Article 84 in the context of the mobility component. By Article 83:

83.—(1) A person is entitled to the daily living component at the standard rate if—

(a) the person's ability to carry out daily living activities is limited by the person's physical or mental condition; and

(b) the person meets the required period condition.

(2) A person is entitled to the daily living component at the enhanced rate if—

(a) the person's ability to carry out daily living activities is severely limited by the person's physical or mental condition; and

(b) the person meets the required period condition.

13. The conditions of entitlement set out in the 2016 Regulations clarify the required period condition. In the context of the daily living component they provide at regulation 12 (with parallel provision for the mobility component at regulation 13):

12.—(1) C meets the required period condition for the purposes of Article 83(1) where—

(a) if C had been assessed at every time in the period of 3 months ending with the prescribed date, it is likely that the Department would have determined at that time that C had limited ability to carry out daily living activities; and

(b) if C were to be assessed at every time in the period of 9 months beginning with the day after the prescribed date, it is likely that the Department would determine at that time that C had limited ability to carry out daily living activities.

(2) C meets the required period condition for the purposes of Article 83(2) where—

(a) if C had been assessed at every time in the period of 3 months ending with the prescribed date, it is likely that the Department would have determined at that time that C had severely limited ability to carry out daily living activities; and

(b) if C were to be assessed at every time in the period of 9 months beginning with the day after the prescribed date, it is likely that the Department would determine at that time that C had severely limited ability to carry out daily living activities.

14. This case further involves consideration of the administrative provisions dealing with effective dates for superseding decisions where changes of circumstances are notified late. The relevant provisions are the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (Northern Ireland) 2016 (the Decisions and Appeals Regulations). In particular, regulation 35(1), Schedule 1 and regulation 36 make relevant provision.

15. By regulation 35(1), the date on which a superseding decision takes effect is determined with reference to Schedule 1.

35.—(1) Schedule 1 makes provision for the date from which a superseding decision takes effect where there has been, or it is anticipated that there will be, a relevant change of circumstances since the earlier decision took effect.

16. In cases such as the present one where the supersession is advantageous to the claimant, paragraph 14 of Schedule 1 is of particular relevance. It provides:

14. Except in a case where paragraph 15 or 31 applies, where the superseding decision is advantageous to the claimant and the change of circumstances was notified to an appropriate office more than one month after the change occurred or after the expiry of such longer period as may be allowed under regulation 36 (effective dates for superseding decisions

where changes notified late), the superseding decision takes effect from the date of notification of the change.

17. Paragraph 31 refers to the situation where the claimant becomes entitled to another relevant benefit and does not apply to this particular case. Paragraph 15 provides:

15. Where—

(a) the change is relevant to entitlement to a particular rate of personal independence payment; and

(b) the claimant notifies an appropriate office of the change no later than one month after the date on which the claimant first satisfied the conditions of entitlement to that rate or within such longer period as may be allowed under regulation 36 (effective dates for superseding decisions where changes notified late),

the superseding decision takes effect from the date on which the claimant first satisfied those conditions.

18. Regulation 36 in turn provides:

36.—(1) For the purposes of regulation 35(1) (effective dates: Department's decisions) and paragraphs 6, 14 and 21 of Schedule 1 (effective dates for superseding decisions made on the ground of a change of circumstances), the Department may extend the time allowed for a person ("the applicant") to give notice of a change of circumstances in so far as it affects the effective date of the change if all of the following conditions are met.

(2) The first condition is that an application is made to the Department at an appropriate office for an extension of time.

(3) The second condition is that the application—

(a) contains particulars of the change of circumstances and the reasons for the failure to give notice of the change of circumstances on an earlier date; and

(b) is made— within 13 months of the date on which the change occurred, or in the case of personal independence payment where a notification is given under paragraph 15 of Schedule 1 (effective dates for superseding decisions made on the ground of a change of circumstances) within 13 months of the date on which the claimant first satisfied the conditions of entitlement to the particular rate of personal independence payment.

(4) The third condition is that the Department is satisfied that it is reasonable to grant the extension.

(5) The fourth condition is that the change of circumstances notified by the applicant is relevant to the decision which is to be superseded.

(6) The fifth condition is that the Department is satisfied that, due to special circumstances, it was not practicable for the applicant to give notice of the change of circumstances within the relevant notification period.

(7) In determining whether it is reasonable to grant an extension of time—

(a) the Department must have regard to the principle that the greater the amount of time that has elapsed between the end of the relevant notification period and the date of the application, the more compelling should be the special circumstances on which the application is based;

(b) no account is to be taken of the fact that the applicant or any person acting for the applicant was unaware of, or misunderstood, the law applicable to the case (including ignorance or misunderstanding of the time limits imposed by these Regulations); and

(c) no account is to be taken of the fact that a Commissioner or a court has taken a different view of the law from that previously understood and applied.

(8) An application under this regulation which has been refused may not be renewed.

(9) In this regulation “the relevant notification period” means—

(a) in the case of universal credit, the assessment period in which the change of circumstances occurs; or

(b) in any other case, a period of one month, beginning with the date on which the change of circumstances occurred.

Submissions and hearing

19. I directed an oral hearing of the appeal. Mr Clements appeared for the Department. The respondent attended accompanied and represented by his son. I am grateful to them for their submissions.

20. Mr Clements submitted that the tribunal had erred in law on the basis that it had failed to have regard to the “required period” in Articles 83 and 84 of the Welfare Reform Order, as further prescribed in regulation 12 and 13 of the 2016 Regulations. The legislation laid down a prescribed period of three months of limitation before an award of the standard rate of a component could begin, but also laid down a prescribed period of three months of severe limitation before an award of an enhanced rate of a

component could begin. The required period had to be satisfied not just when a claim was initially made, but also upon an award changing from standard to enhanced rate such as in the present case, following a supersession. His basic submission was that the tribunal had accepted that a change of circumstances had occurred, but failed to have regard to the required period and erred in law by awarding the enhanced rate of both components from the date of the change, rather than from the end of the required period some three months later.

21. He further queried the tribunal's approach to the provisions that permitted an extension of time for backdating an award under regulation 36. Specifically, he submitted that there were five conditions to satisfy in regulation 36, but that the tribunal did not appear to have had regard to the third condition at regulation 36(4). This required the tribunal to address whether it was reasonable to grant the extension. This question in turn had to be addressed in the light of the three conditions set out in regulation 36(7). Whereas the second and third conditions did not have application, the first one did. This was the principle that the greater the amount of time that has elapsed between the end of the relevant notification period and the date of the application, the more compelling should be the special circumstances on which the application is based. Mr Clements submitted that the tribunal did not appear to have addressed this consideration at all.
22. The applicant's son then addressed me on his father's difficulties and submitted that the enhanced award should have been made back in 2020. He addressed some of Mr Clements' submissions and assisted me with my understanding of the factual background to the case.

Assessment

23. I consider that there is force in the grounds advanced by Mr Clements. The form of regulation 12(1)(a) and 12(2)(a) and of regulation 13(1)(a) and 13(2)(a) of the 2016 Regulations provides that the standard rate of PIP and the enhanced rate of PIP each have their own required period. It is therefore a condition of entitlement to the enhanced rate that the three month required period is satisfied following a change of circumstances, notwithstanding that it may have been satisfied in respect of the standard rate at an earlier time. The tribunal here backdated the award to the date it assessed as the beginning of the change of circumstances – namely a particular medical operation.
24. The general rule in PIP cases arising from regulation 35(1) of the Decisions and Appeals Regulations and from paragraph 14 of Schedule 1 to the Regulations, is that the date from which supersession takes effect is the date of the claimant's notification of the change of circumstances to the Department.
25. Paragraph 15 provides an exception, however. By paragraph 15(a), this only applies in cases where the change is relevant to a particular rate of PIP entitlement. By paragraph 15(b), where a claimant notifies a change

of circumstances to the Department within one month of the date on which he or she first satisfied the conditions of entitlement to that rate (or such longer period as may be allowed under regulation 36), the superseding decision takes effect from the date on which the claimant first satisfied the conditions.

26. This case involved an increase from the standard rate to the enhanced rate of both daily living and mobility components. Therefore, paragraph 15(a) is satisfied. The tribunal was satisfied that the change of circumstances relevant to the change of the rate of entitlement was 23 February 2022. However, as seen above, the actual conditions of entitlement to the enhanced rate included the need to satisfy the severely limited ability condition throughout a three month required period and, therefore, entitlement could not properly start until 23 May 2022 at the earliest. I accept the submissions of Mr Clements that the tribunal has erred in law by holding otherwise.
27. In the particular case, the respondent had sought supersession on 15 September 2022. The tribunal in allowing backdating had been influenced by a report of 28 June 2022 noting significant suicidal thoughts that had resulted in an urgent referral to mental health services. The tribunal had gone on to look at regulation 36, which can permit backdating for a longer period than one month in special circumstances.
28. Briefly, regulation 36 has six basic conditions. All of these must be met. These are:
 - (i) The application is made to the Department at an appropriate office;
 - (ii) The application gives particulars of the change of circumstances and reasons why the notice of the change of circumstances was not given earlier;
 - (iii) The application is made within 13 months of the date on which the claimant first satisfied the conditions of entitlement to the particular rate of PIP;
 - (iv) The Department is satisfied that it is reasonable to grant the extension of time;
 - (v) The change of circumstances is relevant to the decision which is to be superseded;
 - (vi) Due to special circumstances it was not practicable for the applicant to give notice of the change of circumstances within the relevant notification period.
29. By regulation 36(7) the question of reasonableness must be considered in the light of three further factors, including the principle that the greater the amount of time that has elapsed between the end of the relevant

notification period and the date of application, the more compelling should be the special circumstances on which the application is based. By regulation 36(9), the “relevant notification period” in the context of PIP is a period of one month beginning with the date on which the change of circumstances occurred.

30. Mr Clements had been granted leave to appeal on his first ground by the LQM. His second ground was in essence that the tribunal had not shown that it had addressed the question of reasonableness and the principle in regulation 36(7). I accept that this is an arguable ground and I grant leave to appeal on it also.
31. Mr Clements further scrutinised some of the tribunal’s findings of fact. In particular, it attributed 23 February 2022 as the date of a tibial fracture sustained by the respondent. It appears that the factual position is more complex. The respondent sustained a serious tibial fracture in 2020, but this did not heal correctly, and I understand from the submissions of the respondent’s son that 23 February 2022 was the first of two dates when a procedure was undergone to re-break the tibia and try to re-set it.
32. Turning to Mr Clements’ submissions on whether the tribunal applied the correct test under regulation 36, I will set out its relevant findings. It said at paragraph 13 of the statement of reasons:

“Having considered all the evidence in the round, the tribunal concluded that the state of the Appellant’s mental health throughout 2022, which was partially related to his physical problems, was such that special circumstances existed to justify his failure to report the change of circumstances earlier, and that it would not have been reasonably practicable for him to give notice of the relevant change of circumstances within the relevant notification period, due to his mental health issues and the apparent lack of a meaningful support network.”

33. It can be seen that the tribunal has not expressly addressed whether it would be reasonable to grant an extension of time as a separate issue. However, I do consider that it is significant that it has used the work “reasonably” when addressing whether it would have been practicable for the respondent to give notice within the relevant notification period. In short, while perhaps conflating a number of issues in the wording of its conclusions, it appears to have addressed itself to the correct test. I consider that the tribunal has not erred in law as submitted in the second ground.
34. Nevertheless, I allow the Department’s appeal on the first of Mr Clements’ grounds, namely that the tribunal has not addressed itself to the “required period” condition.

Disposal

35. I give the decision I consider the tribunal should have given without making fresh or further findings of fact.
36. I decide that the respondent is entitled to the enhanced rate of the daily living component and the enhanced rate of the mobility component backdated for the period from 23 May 2022 to 14 September 2022 inclusive.

(Signed): O STOCKMAN

COMMISSIONER

18 November 2024