

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 January 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Enniskillen.
2. An oral hearing of the application has been requested. However, I consider that the proceedings may properly be determined without an oral hearing.
3. 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. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

4. The applicant had been in receipt of disability living allowance (DLA) from the Department for Communities (the Department) at the high rate of the care component. He claimed personal independence payment (PIP) by telephone from the Department from 30 November 2016 on the basis of needs arising from recurring kidney infections, prostate problems, back pain, lumbar disc degeneration, mild obstructive sleep apnoea, fibromyalgia, chronic fatigue syndrome, reactive depression, epigastric hernia, pernicious anaemia and ocular hypertension. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 12 August 2016. He was asked to attend a consultation with a healthcare professional (HCP) and a

consultation report was received by the Department on 19 September 2016. On 26 October 2016 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP. The applicant requested a reconsideration of the decision and provided further medical evidence. He was notified that the decision had been reconsidered by the Department and revised, awarding the standard daily living rate of PIP from 30 November 2016 to 31 August 2019, but not the mobility component. He appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 4 January 2018 the tribunal disallowed the appeal, removing the award of daily living component. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 15 May 2018. 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 14 June 2018. On 21 June 2018 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The applicant submits that the tribunal has erred in law on the basis that:
 - (i) it had given insufficient weight to his GP factual report dated 26 April 2016;
 - (ii) it equated his ability to drive with preparing food;
 - (iii) it equated his ability to drive with managing the toilet;
 - (iv) it gave inadequate reasons for its findings on "Engaging with other people";
 - (v) it gave inadequate reasons for its findings on "Planning and following a journey";
 - (vi) it failed to take medical reports into account.
7. The Department was invited to make observations on the applicant's grounds. Mr Williams of Decision Making Services (DMS) responded on behalf of the Department. Mr Williams submitted that the tribunal had erred in law, submitting that the tribunal failed to address the issue of aids and appliances in the activity of "Managing Toilet Needs or Incontinence". However, he submitted that this could attract, at most, 2 points and was therefore not sufficiently material as to affect the outcome of the appeal.

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 evidence before it consisting of the Department's submission, containing the questionnaire completed by the applicant and a consultation report from the HCP. It had access to previous records of proceedings and to the applicant's general practitioner (GP) records. It had a submission from the applicant's representative and evidence relating to his past DLA claim. The applicant attended, represented by Ms Williams, and accompanied by his wife. The Department was represented by Ms Lavery. The applicant was advised about the power of the tribunal to remove an existing award of PIP and signed what is referred to as a POT(OH) form. I have not seen that form, which would appear to have the purpose of serving as evidence that the appellant has been made aware that a tribunal may reduce as well as increase entitlement to benefit. The applicant declined to give oral evidence, saying that he was incapable due to memory issues, but his wife gave oral evidence.
9. The relevant daily living activities were activity 1 (Preparing food), activity 3 (Managing therapy..), activity 4 (Washing and bathing), activity 5 (Managing toilet needs), activity 6 (Dressing and undressing) and activity 9 (Engaging with other people face to face). The tribunal heard oral evidence and considered the documentary evidence. It made a particular finding that up to 4 May 2017 (the date of an earlier adjourned hearing) the applicant had been driving a motor vehicle. It observed a number of his statements in reports before it including those to an occupational therapist. On the basis of the evidence it found that he did not require help preparing meals, taking nutrition, or using the toilet. It accepted that he would have some needs with managing therapy, washing and dressing, awarding 5 points, which was insufficient to qualify for an award of daily living component. It further accepted that he would attract 4 points for "Moving around" - mobility activity 2, which was insufficient to qualify for an award of mobility component.

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. Activity 5 is relevant to this appeal. It is set out below:

5. Managing toilet needs or incontinence.	a. Can manage toilet needs or incontinence unaided.	0
	b. Needs to use an aid or applicant 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

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 applicants 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 applicant firstly submits that the tribunal has erred in law by giving insufficient weight to the report of his GP. This was a factual report dated 24 June 2016, which was addressed to the conditions of entitlement for DLA. From the statement of reasons I can see that the tribunal relied on this to the extent that it referred to decreased mobility “by way of fatigue

and muscle spasms” [sic]. In fact the GP referred to muscle pains, but I do not consider that anything turns on that error. The GP report further referred to the applicant needing “a lot of help and assistance from his wife with ADL’s” [activities of daily living]. As observed above, the tribunal awarded 4 points for mobility activity 2.b, and 5 points for the daily living activities of Managing therapy, Washing and bathing and Dressing and undressing. It declined to award the points for Preparing food and Managing toilet needs that the Department had awarded in the decision under appeal.

17. The GP report is silent on the issue of preparing food. It similarly contains no specific evidence on the issue of managing toilet needs. The applicant’s submission is that the tribunal gave it insufficient weight. However, a tribunal is entitled to give the weight it chooses to a particular piece of evidence, in the context of all the evidence before it. It will only err in law if it fails to address a conflict between that evidence and some other evidence, or if the evidence compels a contrary conclusion to that actually reached. The tribunal in this case awarded points for daily living activities and mobility activities that were consistent with the GP’s report. That report, as far as preparing food and managing the toilet was concerned did not compel any different conclusion to that reached. I do not consider that the tribunal has arguably erred in law in this regard.
18. The applicant secondly submits that the tribunal erred in addressing the ability of the applicant to perform certain daily activities in the light of his ability to drive a car up to 4 May 2017. He submits that this indicates that the tribunal gave weight to an immaterial matter. I disagree. The ability of a claimant to perform one type of daily activity which is not within the scheduled activities can be helpful in determining whether he or she has the ability to perform certain other activities which are.
19. Ability to drive a car is dependent on certain functional and cognitive abilities. Among other things, it requires the ability to open the door and enter and exit the vehicle; to sit without changing position for a period of time; to use the hands to grip and turn the controls and to make nuanced arm movements to steer; to use the feet on pedals to accelerate and brake, and to use the clutch in a manual car; to move the upper body and neck flexibly to look around; to be able to plan a journey and respond to unpredictable circumstances and road conditions; and to have adequate vision and reactions to drive safely.
20. The ability to drive a car is not consistent with a high level of dependency on others with the activities of daily living. It is legitimate for a tribunal to consider how the actions involved in driving a car may read across into the scheduled daily living and mobility activities. Nevertheless, that general principle is subject to the qualification that the activity in question is genuinely comparable and that it is done with the same level or regularity as the scheduled activity. The ability to perform daily living activities has to be addressed within the context of regulation 4 and regulation 7 of the PIP Regulations. The implication is that occasional

driving may not be an appropriate comparator. It is certainly arguable that, unless the tribunal determines whether a claimant could drive on over 50% of the days in the required period, it has not properly addressed regulation 7, for example.

21. However, in this case I do not have to address that issue. In his PIP2 questionnaire, the applicant had complained of hand tremors which made it difficult to lift an object heavier than a cup or to use a knife and being too tired to stand or sit. The tribunal found on the basis of the applicant's statement that he drove a car until May 2017 that he had a certain level of dexterity and concentration. However, he had also said to the HCP that he was able to peel, chop and cut up raw vegetables. The tribunal further found that the applicant's upper limb examination by the HCP was essentially normal. In other words, it rejected his credibility on the basis of other evidence. Whatever the frequency of the applicant's driving, the evidence indicated that he would have no problem preparing and cooking food in any event. I do not accept that he has an arguable case on this basis.
22. Thirdly, the applicant submits that the tribunal wrongly relied upon the issue of driving in the context of Managing toilet needs and incontinence. The tribunal referred to the ability to get in and out of a car as evidence that the applicant could use the toilet unaided. However, that was not the key issue in addressing this activity. The applicant submits that he referred to the use of incontinence pads in order to manage urinary incontinence but that the tribunal failed to address it. It is evident that he made such a reference in the PIP2 questionnaire and in oral evidence.
23. In *CD-v-Department for Communities (PIP)* [2018] NI Com 30 (C5/18-19(PIP)) Chief Commissioner Mullan endorsed the decision of Upper Tribunal Judge Rowley in *BS v The Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0456 (AAC). That decision in turn held that incontinence pads should be considered as an aid or appliance falling within descriptor 5(b).
24. In his submissions for the Department, Mr Williams has referred to the applicant's evidence that he used pads in bed at night due to incontinence. He submitted that this issue required further investigation by the tribunal in assessing the activity of toilet needs. In light of his submissions, which indicate an arguable error of law by the tribunal, I grant leave to appeal.
25. Mr Williams nevertheless submits that any error in this respect is not material as it would have added a maximum of 2 points to the applicant's score for daily living component. This would have totalled 7 and still fallen below the relevant threshold for entitlement, namely 8. However, I observe that the applicant had some points removed by the tribunal that had been awarded by the Department, and had been awarded one additional point by the tribunal. The tribunal had not needed to re-examine the daily living component, because of Article 15(8)(a) of the

Social Security (NI) Order 1998 permitted it not to. It re-opened the daily living component award against a background of an understanding of the law which was erroneous. I consider that the margins in this case are relatively fine and that I should allow the appeal and set aside the decision of the appeal tribunal.

26. It follows that I do not need to consider the additional submissions of the appellant.
27. I direct that the appeal shall be determined by a newly constituted tribunal.

(signed): O Stockman

Commissioner

6 February 2019