

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 2 July 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 Banbridge.
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 a previous award of disability living allowance (DLA) at the low rate of the mobility component and the middle rate of the care component. As that award was due to expire on 15 September 2017, he was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). He made a claim from 8 May 2017 on the basis of needs arising from lower back and leg pain, depression, bladder trouble and irritable bowel. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 30 May 2017. He was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 17 July 2017. On 26 July 2017 the Department decided that the appellant did not satisfy the conditions of entitlement to the mobility component of PIP, but did satisfy the conditions of entitlement to the daily living component at the

standard rate from and including 8 May 2017. The appellant requested a reconsideration of the decision, and he was notified that the decision had been reconsidered by the Department but not revised. He appealed.

4. 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 2 July 2018 the tribunal disallowed the appeal, removing entitlement to the daily living component. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 28 November 2018. 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 12 February 2019. On 4 April 2019 the appellant applied to a Social Security Commissioner for leave to appeal.
5. The application was late. However, on 19 August 2018 the Chief Commissioner accepted the late application for special reasons.

Grounds

6. The appellant, represented by Mr Black of Law Centre NI, submits that the tribunal has erred in law on the basis that:
 - (i) it misdirected itself as to the law in respect of daily living activity 1 in terms of use of an aid;
 - (ii) it misdirected itself as to the law in respect of daily living activity 5 in terms of use of an aid;
 - (iii) it failed to give adequate reasons in respect of daily living activity 6;
 - (iv) it misdirected itself as to the law in respect of mobility activity 2.
7. The Department was invited to make observations on the appellant's grounds. Mr Arthurs of Decision Making Services (DMS) responded on behalf of the Department. Mr Arthurs submitted that the tribunal had erred in law as alleged, but not sufficiently to vitiate the decision of the tribunal. He indicated that the Department did not support 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, containing the questionnaire completed by the appellant, a consultation report from the HCP, a letter from the appellant's General Practitioner (GP), a prescription list and a GP factual report relating to DLA. The tribunal also had access to the appellant's medical records. The appellant attended the hearing and gave oral evidence, represented by Mr Vellum, and the Department was

represented by Ms Cormac. The tribunal advised the appellant that his existing award could be varied on appeal and he confirmed that he understood this and wished to continue with his appeal.

9. The tribunal accepted that the appellant had medical conditions requiring ongoing review and treatment. These included lower back and leg pain, depression, irritable bowel and bladder frequency and alcohol and personality disorder. However, on the basis of the medical evidence, it found that the appellant overstated the effects of these on his functional ability. The appellant indicated that he used an aid in the form of a litter picker to reach objects in low kitchen cupboards when preparing food, that he used a urine bottle at night and that he kept socks on overnight, rarely using a sock aid. The tribunal concluded that the appellant was able to perform the daily living activities to the standard required by legislation, with the exception of washing and bathing, awarding 2 points for descriptor 4(b). Again, in relation to mobility activities, the tribunal found that the appellant overstated his functional limitations. It awarded no points for activity 1 but awarded 4 points for activity 2(b). 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. The nature of the assessment is qualified, *inter alia*, by regulation 4, which provides:

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 which C normally wears or uses; or

(b) as if C were wearing or using any 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.

13. A relevant descriptor in this case, 1(b), falls under the activity heading of “Preparing food”, namely:

<i>Activity</i>	<i>Descriptors</i>	<i>Points</i>
1. Preparing food.	...	
	b. Needs to use an aid or appliance to be able to either prepare or cook a simple meal.	2
	...	

14. A further relevant descriptor falls under the heading of “Managing toilets needs or incontinence”, namely:

5. Managing toilet needs or incontinence. ...
b. Needs to use an aid or appliance to be able to manage toilet needs or incontinence. 2
...
15. A third relevant descriptor falls under the activity heading of “Dressing and undressing”, namely:
6. Dressing and undressing. ...
b. Needs to use an aid or appliance to be able to dress or undress. 2
...

Submissions

16. I granted leave to appeal and I held an oral hearing. Mr Black of Law Centre NI appeared for the appellant, who was not present. Mr Arthurs of DMS appeared for the Department. I am grateful to Mr Black and to Mr Arthurs for their helpful submissions.
17. The grounds advanced by Mr Black fell into two categories, those addressing the tribunal’s consideration of the use of aids by the appellant and those relating to the consideration of pain and discomfort while mobilising.
18. Mr Black firstly submitted that in his evidence regarding the activity of preparing food, the appellant referred to his use of a litter picker. Mr Black relied on a decision of Upper Tribunal Judge Wright in *EG v Secretary of State for Work and Pensions* [2015] UKUT 275 as authority for the proposition that a walking stick can be regarded as an aid, and submits that the use of a litter picker is analogous to that.
19. Mr Black secondly submitted that the tribunal heard evidence in the context of managing toilet needs or incontinence that the appellant used a urine bottle to avoid having to go to the toilet during the night because of urinary frequency. He submitted, relying on the decision of Upper Tribunal Judge Poynter in *KW v Secretary of State for Work and Pensions* [2017] UKUT 54, that the Department in Great Britain had accepted that a commode was an aid, and that a urine bottle was similarly an aid by extension.
20. Mr Black next submitted that the tribunal heard oral evidence in the context of dressing and undressing that the appellant needed to use a sock aid to take socks on and off. While the appellant indicated that he did not use this often, Mr Black submitted that he nevertheless needed to

use it, and the tribunal had not explained its finding on this activity adequately.

21. Finally, Mr Black submitted that the tribunal had not addressed the impact of pain on the appellant's ability to mobilise. He relied on the decision of Upper Tribunal Judge Markus in *PS v Secretary of State for Work and Pensions* [2016] UKUT 326 to submit that the tribunal failed to address the issue of pain experienced by the appellant in deciding that he could mobilise to an acceptable standard.
22. In response, Mr Arthurs for the Department offered some support for the appellant's case in relation to managing incontinence, while opposing the remaining grounds. He submitted that a litter picker as used by the appellant was not an aid to either preparing or cooking food, but preliminary to those stages. He observed that the credibility of the appellant was doubted by the tribunal. He further submitted that a litter picker was of limited utility in the circumstances and that its use was possibly unsafe.
23. On the issue of incontinence Mr Arthurs submitted that the credibility of the appellant was not accepted by the tribunal. He accepted, however, that it had not fully explained its decision on use of a urine bottle and that this amounted to an error of law by the tribunal.
24. On the issue of dressing and undressing, he accepted that the sock aid was relevant. He submitted that under PIP legislation it was not the issue of whether the sock aid was used, but whether the appellant had a need to use a sock aid that was relevant. However, he again submitted that the appellant's credibility was rejected and that the tribunal clearly doubted the appellant's need for regularly using a sock aid.
25. On the final issue of mobility, Mr Arthurs again submitted that the tribunal did not find the appellant's account of problems with mobilising to be credible. He submitted that the limitations claimed were not supported by the medical evidence before the tribunal and that it had made a reasonable decision on this issue.

Assessment

26. On the first ground, relating to use of a litter picker, Mr Black referred me to the decision of Upper Tribunal Judge Wright in *EG v Secretary of State for Work and Pensions* [2015] UKUT 275. He observed that in that case Judge Wright had given permission to appeal on the ground of whether a walking stick (or perching stool) could amount to an aid or appliance for the purposes of descriptor 1(b) which provides that the claimant "Needs to use an aid or appliance to be able to either prepare or cook a simple meal" in order to qualify for an award of 2 points.
27. Judge Wright did not ultimately need to address the issue of whether a walking stick could be an aid in this context. However, he made *obiter*

remarks to the effect that a walking stick could probably just as much be an aid as a stool or perching stool. It appears to me that the context was the use of a walking stick for support to stand while preparing or cooking food.

28. A litter picker can be described as a stick with a grabbing mechanism at one end which is controlled by a lever or trigger at the other end. Its use is for picking up items that are otherwise out of reach. It was accepted by Mr Black that the litter picker was not an aid to cooking. His submission was confined to the area of preparing food. He submitted that the appellant used the stick to reach food or utensils in low cupboards. Mr Arthurs doubted the utility and safety of this and submitted that the tribunal had rejected the credibility of the appellant's account. He further submitted that the use of the litter stick was to gather utensils and food, and therefore was involved at a stage preliminary to preparing food.
29. In light of Mr Black's submissions that the activity of preparing food might require bending, Mr Arthurs produced some background materials and I permitted these to be opened to me. They were "Personal Independence Payment: initial draft of assessment criteria", dated May 2011, Personal Independence Payment: second draft of assessment criteria", November 2011, and "The Government's response to the consultation on the Personal Independence Payment assessment criteria and regulations", December 2012. The consultation exercise carried out by the Department for Work and Pensions led to the Social Security (Personal Independence Payment) Regulations 2013, which first came into force in Great Britain in 2013 and upon which the 2016 Regulations are based.
30. Mr Arthurs' submission was to the effect that the consultation response made it clear that problems with bending were considered as attracting points under the activities of "Washing and bathing" and "Dressing and undressing". He submitted that the cooking activity specifically excluded bending. Therefore, an aid that enabled someone who had restrictions in bending to pick up items could not be considered.
31. Mr Arthurs had first produced this material at hearing. As it had not been previously seen by Mr Black, I afforded him some time to make written comment on it after the hearing. He had nothing to add to his submissions at hearing. I consider that it is appropriate to have regard to the background consultation exercise in seeking to clarify the intention of those making the regulations (see *R(Quintavalle) v Secretary of State for Health* [2003] UKHL 13, at paragraph 8). I admit the material. However, I find that it is silent on the issue of bending in the context of preparing food and does not definitively resolve the issue.
32. I accept Mr Black's concession that a litter picker is not an aid in cooking food. The definition of "cook" in the 2016 Regulations is to heat food at or above waist height. This removes any consideration of bending to take things out of an oven or reaching for things below waist height. The

2016 Regulations also provide a definition of preparing food. “Prepare”, in the context of food, means make food ready for cooking or eating.

33. Mr Black indicates that the litter picker is used by the appellant to reach utensils and food from low cupboards. Ignoring the question of why someone with the claimed level of disability would store regularly used items in low cupboards, the more immediate question is whether preparing food includes taking items out of a cupboard.
34. It seems to me that there are many preliminaries before a claimant arrives at the activities assessed in the legislation. Food needs to be obtained, which typically involves shopping. Shopping bags need to be carried and items unloaded from bags. Items may then be stored and may need to be accessed from cupboards, refrigerator or freezer. Work surfaces may need to be cleared and cleaned. Items such as chopping boards, knives, pans and stirring spoons may need to be put into place.
35. It seems to me that “to make food ready for cooking ...” has quite a narrow meaning, however. To make food ready for cooking implies to me that only a range of tasks immediately preliminary to the process of heating food at or above waist height can be considered. This might include washing, peeling and chopping fresh vegetables; preparing meat or fish, including cutting it into smaller pieces; opening packets of pasta, rice or noodles; opening tins and packets containing other foodstuffs, including frozen items; pouring or emptying foodstuff items from packets or tins; using common kitchen equipment such as graters, grinders and food processors; putting food into pots or pans, and adding boiled water to pots. I do not intend to be prescriptive but to give a broad range of examples to which other relevant tasks may be analogous.
36. I consider that the act of taking an item out of a cupboard – whether a cooking utensil or a cooking ingredient - cannot reasonably bear the meaning of making food ready for cooking. That expression can only refer to some action that readies an item of food for cooking forthwith. Simply taking an item from a cupboard does not do that, whether an aid is required to accomplish it or not. I see no reasonable function for the litter picker in the context of preparing food. I therefore do not accept the submission of Mr Black that the tribunal has erred in its approach to this issue.
37. The second issue advanced by Mr Black related to the activity of “managing toilet needs and incontinence”. He submitted that the tribunal should have awarded points for descriptor 5(b), namely that on the basis that the appellant needs to use an aid or appliance to be able to manage toilet needs or incontinence. He addressed the tribunal’s approach to the appellant’s evidence that he used a urine bottle at night. He referred to the decision of Upper Tribunal Judge Poynter in *KW v Secretary of State for Work and Pensions* [2017] UKUT 54. In that decision, it was pointed out that the Department accepted that a commode was an aid.

38. In *KW v SSWP* Judge Poynter had highlighted something of an inconsistency in the Department's approach in accepting that a commode was an aid for the purposes of activity 5, yet declining to accept that a claimant's mobility difficulties can ever be relevant to the daily living activity of managing toilet needs or incontinence. Judge Poynter explained it well when he said, at paragraphs 16-22:

"16. As it relates to managing incontinence, I regard that position as problematic.

17. I accept that if a claimant does not suffer from incontinence—that is to say, if he does not have a condition that reduces his ability to control his bowel or bladder so that, at least on occasion, he experiences involuntary evacuation—then there is nothing to manage within the meaning of the activity and therefore mobility problems cannot be relevant to such management.

18. Put another way, many people with normal bowel and bladder control may nevertheless experience being "caught short" from time to time. And it is not difficult to accept that a person whose mobility is restricted is likely to find himself caught short more often than someone whose mobility is unimpaired. That may mean that the former person has more toilet accidents than the latter (who may, in practice, have none). But, in the absence of a condition that impairs voluntary control over the bowel or bladder, that is because of the former's restricted mobility, not because he is incontinent.

19. However, if a claimant does have a condition that can lead to involuntary evacuation of the bowel or bladder, the position seems to me to be different. Such a person may or may not also have mobility problems and, if he does, then it seems likely that the condition will be more difficult to manage than if he does not. In such a case, I cannot as presently advised see any reason why any mobility problems should not be taken into account when assessing whether such a claimant reasonably needs to use an aid or appliance. That is particularly so given the Secretary of State's acceptance that the assessment must address the reasonable needs of a person with the claimant's characteristics. Finally, it is relevant that the definition states that managing incontinence includes "us[ing] a collecting device or self-catheterisation, and clean[ing] oneself afterwards": it is not confined to those activities.

20. There is also a tension between the Secretary of State's acceptance in this appeal that a commode can be

an aid for the purposes of daily living activity 5 and his view that mobility problems are never relevant to that activity.

21. The main difference between a commode and a toilet is that the former is mobile and the latter is not. A person suffering from incontinence has to go to a toilet; but a commode can come to him. I accept that it is also the case that a toilet will be plumbed in and a commode will not. However, that is really no more than an aspect of the need for the commode to be mobile. I can see no other relevant differences.

22. As it is obviously not a prosthesis, acceptance that a commode is an "aid" within the definition in regulation 2 of the PIP Regulations entails acceptance that it is a "device which improves, provides or replaces C's impaired physical or mental function". Mental functions are not in issue, and it is difficult to see which physical function the commode is improving, providing or replacing, if not mobility. Therefore, if mobility is never a relevant physical function in relation to managing incontinence, it is difficult to see how a commode be an aid for the purpose of that activity. Yet the Secretary of State accepts that it is such an aid".

39. The appellant in this case had complained of "bladder problems" in his PIP2 questionnaire, following surgery on his spine. He said that he had pain before and during urination and sometimes had to "go" 5 or 6 times during the night. The HCP had addressed the appellant's other stated problem of difficulty rising from the toilet, and advised that 2 points were appropriate for use of a handrail when rising from the toilet. However, the tribunal removed these on the basis of the appellant's evidence that he could rise from a chair unaided.
40. The appellant had given evidence of using a urine bottle at night. While the tribunal addressed the question of managing toilet needs, it does not appear to have fully addressed the separate issue of managing incontinence. To "manage incontinence" means to manage involuntary evacuation of the bowel or bladder, including use a collecting device or self-catheterisation, and clean oneself afterwards. It appears to me that a urine bottle falls within category of aids and appliances relevant to someone at risk of involuntary evacuation of the bladder.
41. I would expect the tribunal to have made some findings as to whether the appellant was at risk of involuntary evacuation of the bladder, and whether this was contributed to by mobility difficulties. It does not appear to have made such findings, and as a result its reasoning is opaque. It is not clear to someone reading the tribunal's decision whether it declined to accept that the appellant had a physical condition that placed him at

risk of urinary incontinence, whether it found that a urine bottle was not an aid within the meaning of the legislation or whether it did not accept the credibility of the appellant's account that he needed to use a urine bottle. For the reasons advanced by Mr Black and supported by Mr Arthurs, I accept that the tribunal has erred in law on this issue.

42. Mr Black made further submissions relating to use of a sock aid under activity 6 – dressing and undressing. He submitted that the appellant needs to use an aid or appliance to be able to dress or undress. The definition of “dress and undress” includes put on and take off socks and shoes.
43. Mr Arthurs accepted that a sock aid was relevant to this descriptor. He submitted that the evidence of leaving socks on at night was not relevant on the basis that points should be awarded on the basis of the need to use an aid even if it was not used. He submitted, however, that the tribunal had rejected the appellant's credibility. He had simply not been believed. Mr Black indicated that he could not disagree that credibility was in issue. He further submitted that issue is whether the aid was needed even if not used and that the tribunal was not entitled to reach the conclusion that it had on the evidence.
44. Finally, on mobility, Mr Black referred me to *PS v Secretary of State for Work and Pensions* [2016] UKUT 326, a decision of Upper Tribunal Judge Markus. She had highlighted the need to consider the impact of pain on a claimant's ability to mobilise, finding that pain was relevant to the question of whether an activity was carried out to an acceptable standard for the purposes of the GB equivalent of regulation 4(3)(b).
45. Mr Black submitted that the finding that the appellant could walk 50 yards to the top of his lane had not considered his evidence of pain and discomfort over short distances. Mr Arthurs submitted that this issue was linked to credibility again. He submitted that the tribunal's finding that the appellant's claim of functional restriction was not supported by evidence. Mr Black candidly accepted that the tribunal, having found that the appellant scored points under descriptor 4(b), might have been entitled to reject the appellant's evidence, but submitted that it needed to put reference to his pain into its reasons.
46. Having decided the appeal on the basis of the error of law in relation to activity 5, I consider that I do not need to address the appellant's last two grounds. Mr Arthurs has submitted that because the error of law affects only 2 points, it should not vitiate the tribunal's decision. However, I am also mindful of the fact that the appellant had an award of PIP daily living component before he entered the tribunal hearing and that there is an error in the decision of the tribunal that removed that award.
47. Although the error that I find in the tribunal's decision may only affect 2 points, and that 2 points may not be material to the outcome, in order to avoid any feeling of injustice, I consider that the appropriate disposal is to

set aside the decision of the appeal tribunal and refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

25 November 2019