

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 9 May 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 9 May 2017 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
2. I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. An appeal tribunal which has a Medically Qualified Panel Member is best placed to assess medical evidence and address medical issues arising in an appeal. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.
4. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his entitlement to Personal Independence Payment (PIP) remains to be determined by another appeal tribunal. In accordance with the guidance set out below,

the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

Background

5. On 20 December 2016 a decision maker of the Department decided that the appellant was entitled to the enhanced rate of the daily living component of PIP from 30 August 2016 to 25 October 2019. Following a request to that effect, the decision dated 20 December 2016 was reconsidered on 23 January 2017 and was revised. The revised decision was that the appellant was entitled to the enhanced rate of the daily living component and the standard rate of the mobility component of PIP from 30 August 2016 to 25 October 2019.
6. An appeal against the decision dated 20 December 2016 was received in the Department on 14 February 2017. The appeal tribunal hearing took place on 9 May 2017. The appellant was present and was accompanied by his partner. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal in part removing entitlement to the mobility component of PIP from and including 30 August 2016.
7. On 15 November 2017 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 4 January 2018 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 8 February 2018 a further application for leave to appeal was received in the Office of the Social Security Commissioners. The appellant was represented in this application by Ms Boland of the Law Centre (Northern Ireland). On 29 March 2018 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 27 April 2018, Mr Arthurs, for DMS, supported the application for leave to appeal on one of the grounds advanced on behalf of the appellant.
9. The written observations were shared with the appellant and Ms Boland on 1 May 2018. Written observations in reply were received from Ms Boland on 31 May 2018 and were shared with Mr Arthurs on 4 June 2018. The case became part of my workload in late 2018. On 6 March 2019 I granted leave to appeal. When granting leave to appeal I gave as a reason that the certain of the grounds of appeal, as outlined in the application for leave to appeal, were arguable.
10. On the same date I directed an oral hearing of the appeal. Following an earlier postponement the oral hearing took place on 16 May 2019. The appellant was not present but was represented by Mr Black of the Law Centre (NI). The Department was represented by Mr Arthurs. Gratitude

is extended to both representatives for their detailed and constructive observations, comments and suggestions.

The submissions of the parties

11. The Case Summary was prepared for the oral hearing of the appeal by Mr McCloskey of the Law Centre (NI). Mr McCloskey made the following submissions:

'Grounds of appeal

Insufficient notice was given to the Appellant that the Tribunal was considering making a decision which was less favourable to the Appellant.

The tribunal erred in its approach to mobility activity 1 – Planning and following journeys.

The tribunal erred in its approach to mobility activity 2 – Moving around.

First ground of appeal – Insufficient notice given to the Appellant that the Tribunal was considering making a decision which was less favourable to the Appellant.

In this particular case the appellant attended hearing on 9 May 2017 along with his partner but he was unrepresented. A presenting Officer attended on behalf of the Department. A short record of proceedings includes the following information:

Introduction and explanation of procedure.
Put on notice regarding present award.
Didn't want to see his notes and records.

The statement of reasons issued 24 October 2017 subsequently expands on the above including information which was not specifically noted in the record of proceedings:

The appropriate wording on the appropriate form was read out to the Appellant by the Legally Qualified Tribunal Member at the commencement of the Tribunal. When this was read to the Appellant he was asked if he clearly understood the notice regarding the powers of the Tribunal and he replied that he did so understand and that he did not want to adjourn or seek representation but he wanted to proceed with the hearing on this basis. The Appellant was asked to

sign the appropriate form but he claimed that he could not do this because of the splints in his hands which he was wearing and this in turn prevented him from doing anything with his hands. He was asked if he could make a mark of some sort on the form but he said that he could not even do this. In these circumstances therefore the Legally Qualified Member recorded the fact on the form that the Appellant had been put on notice of the contents of the form but that he could not sign same because he did not have the power in his hands to do this.

A Copy of this form is attached and it is noted that the appellant *couldn't sign but wanted to proceed*. Elements of the form marked as 'delete as appropriate' have not been completed.

There are many decisions which consider the correct procedure to follow in circumstances where the Tribunal is considering making a decision which was less favourable to the Appellant. Arguably the lead Northern Ireland decision is C15/08-09(DLA) which reviewed R(IB) 2/04, C48/03-04(DLA), C24/07-08(DLA), C18/07-08(DLA) and CDLA/884/2008.'

12. Mr McCloskey then cited paragraphs 61 and 62 of my decision in C15/08-09 (DLA). He continued:

'It is submitted that the tribunal has failed to comply with principles (vii) and (ix) outlined above. It is the appellant's case that advising the unrepresented party at the beginning of the hearing (without reference to the *compelling* evidence which gives rise to this potential act) provides insufficient notice of the appeal tribunal's intention to consider making a decision which is less favourable, in order to enable the appellant properly to prepare his case. As will be outlined below in issues two and three, it is clearly arguable that this case did not involve *the most obvious evidence* that the existing award was inappropriate.

The issue of sufficient notice was specifically addressed by Commissioner Stockman in C24/12-13(DLA):

18.I consider that the requirement of "sufficient notice of the appeal tribunal's intention to consider making a decision

which is less favourable” requires that the applicant should be alerted to specific evidence which the tribunal considers may lead to it making a less favourable decision, and thereby be given an opportunity to consider whether he requires an adjournment for further evidence on the issue, or whether he might wish to withdraw the appeal as permitted by regulation 40 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (“the Decision and Appeals Regulations”). It is not evident from the record of proceedings that sufficient notice in this sense was afforded to the applicant.

As conceded by the Department in advance of hearing there is merit in the argument that:

The Tribunal found that there was insufficient medical evidence to support the award of 10 points, but did not put this point to the Appellant to allow them the opportunity to respond. This is in the knowledge that the Appellant would not have viewed the medical notes/records and had had no notice this would be an issue.

Rather than finding actual evidence to question the existing award it appears the tribunal relied on a lack of evidence; arguably did not carry out sufficient findings to support this conclusion (or at least did not provide adequate reasons); and then failed to outline these concerns to the appellant to provide a response. It can therefore be reasonably argued that the appellant was given insufficient prior notice of any compelling evidence which would enable him to make an informed decision about how to proceed in the case. In these circumstances the tribunal should have at least adjourned the hearing.

Although *BTC v Secretary of State for Work and Pensions* (PIP: General) [2015] UKUT 155 (AAC) (*BTC*) relates to GB legislation and the reformed tribunal system, it is the underlying principles of procedural fairness that are relied upon. Upper Tribunal Judge Bano outlines the view at paragraph 7 that it is necessary to give advance notice as is required if the Secretary of

State rather than the tribunal are to raise the issue for consideration.'

13. Mr McCloskey then set out the test of paragraph 7 of the decision in *BTC* in full. He continued:

'As with the present case the tribunal appear to have reasoned that the existing award was overgenerous and there is a lack of adequately documented consideration of the criteria to support this conclusion. However the evidence was clearly not overwhelming, the facts were in dispute and an element of judgment was involved. In these circumstances it was necessary to adjourn in order to provide advance notice and to enable a fair hearing. Relying therefore on principle (ix) of C15/08-09(DLA) in adopting CDLA/884/2008 it is submitted that tribunals should refrain from making decisions less favourable to appellants than the decisions being challenged, except in the most obvious cases. If it is not an obvious case (where the evidence is overwhelming or the facts are not in dispute and no element of judgment is involved or where the law has been misapplied by the Secretary of State) then the safest approach is to adjourn and put the appellant on advance notice of the powers of the tribunal. This provides the option to seek advice and the opportunity to provide further evidence to support the existing award and therefore ensure a fair hearing. This will be to the advantage of the tribunal in reaching the correct decision in a case which does require an element of judgement.

As a result we submit that the tribunal has erred in law by providing insufficient notice to enable an informed decision to proceed without taking the opportunity to take further steps to support the case.

Second ground of appeal – The tribunal erred in its approach to mobility activity 1 – Planning and following journeys.

It is the Appellant's case that the tribunal erred in law in a number of ways with its approach to mobility activity 1 – Planning and following journeys.

First, the "Planning and Following Journeys" descriptors should be interpreted in light of the decision of the three-panel Upper Tribunal in *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 0531 (AAC). In this

case, the UT examined three conflicting decisions of the UT (DA, RC and HL) and concluded at [36]:

“The phrase ‘follow the route’, when given its natural or ordinary meaning, clearly includes an ability to navigate but we do not consider that it is limited to that. Navigation connotes finding one’s way along a route, whereas ‘follow a route’ can connote making one’s way along a route, or to use one of Ms. Scolding’s dictionary definitions, ‘to go along a route’ which involves more than just navigation.”

The Tribunal should therefore have taken into account the Appellant’s need for the assistance of another person to follow a route and his inability to make his way safely along a route without the assistance of another person. Second, the Appellant indicated in his application form for PIP that he sometimes suffered from severe anxiety and distress in relation to going out. This related to the pain that going out would cause him. He stated:

My partner tries to get me to go out more but it is too painful sometimes, so I don’t bother - only when I have to for appointments etc.

In the Statement of Reasons, the Tribunal notes that the Appellant had made this case on his application form. However, the Tribunal concluded that there was no evidence in the medical notes and records of any significant mental health problems and so refused to award points. However, the Tribunal did not question the Appellant on this issue at hearing or put the issue of the medical notes and records to him. In circumstances where the Appellant had clearly stated in his application form that he suffered from severe anxiety and distress in relation to going out, and in circumstances where the Tribunal failed to question the Appellant on this issue or put the medical notes and records to the Appellant, it was unfair for the Tribunal to rely on the medical notes and records to refuse an award of points. This is particularly so where the Tribunal is aware that the Appellant has not viewed the medical notes and records. Further, it is entirely conceivable that an individual would suffer severe anxiety and distress at the thought of experiencing significant pain when going out, irrespective of a lack of medical evidence to support this. The Tribunal erred in

placing such weight on the perceived lack of medical evidence.

Following MH the Department for Work and Pensions appealed to the Court of Appeal against the Upper Tribunal decision and regulations were amended which countered some aspects of the MH decision. In particular the amendments prevented the scoring of points from descriptors 1(c); 1(d) and 1(f) of Planning and following Journeys if the restriction was as a result of overwhelming psychological distress. Similar legislation in Northern Ireland was also amended from 20 April 2017 (SR 2017 No. 69). This post-dated the date of decision under appeal.

It was this later amendment which was declared unlawful in *RF v Secretary of State for Work and Pensions (Mind and Equality and Human Rights Commission intervening)* [2017] EWEHC 3375. We therefore resile our previous submissions in relation to these points as the relevant legislation in this case predated the amendments made on 20 April 2017.

The Department had previously indicated that it accepts that the current legislation needs to be changed and that the Department has committed to looking at all affected cases.

We note that this legislation has now been amended in Northern Ireland with the Personal Independence Payment (Amendment) Regulations (Northern Ireland) 2018 (SR 2018 No.121)

As a result we submit the tribunal has erred in its approach to mobility activity 1.

Third Ground of Appeal - The tribunal erred in its approach to mobility activity 2 – Moving around.

The Department awarded 10 points to the Appellant pursuant to descriptor 2(d): “Can stand and then move using an aid or appliance more than 20m but no more than 50m.” This decision was made on 23rd January 2017 by revising the original decision of 20 December 2016 on Mandatory Reconsideration.

The following supported this finding:

- a) The Appellant's written application for PIP (question 14);
- b) The Consultation Report Form PA4 V3 (including record of a musculoskeletal examination) (particularly at p9 and p22);
- c) The Appellant's letter of 1st January 2017;
- d) The Department's Supplementary Advice Note PA6 (p2);
- e) The Appellant's evidence at hearing (making clear that, although he could walk 50 - 100m, he would be in constant pain, and would not be able to do this repeatedly, meaning that Regulation 4(3) applied).
- f) The medical notes and records (as per the Statement of Reasons, these indicated that the Appellant had a very active disease).

Despite the weight of the above evidence, the Tribunal removed the award for descriptor 2(d) and instead substituted descriptor 2(b), effectively removing the award of standard rate mobility.

There are a number of problems with the Tribunal's approach:

First, as outlined previously the appellant received insufficient notice that the tribunal were considering the validity of the existing award to enable the adequate preparation for a fair hearing. This is particularly so given that the Tribunal relied on the lack of medical evidence that the Appellant could not walk 50-100m repeatedly, but the Appellant had no indication prior to hearing that he would have to produce medical evidence which was supportive of this point.

Second, the Tribunal's finding that there was insufficient medical evidence to support the award was unreasonable, in light of the evidence set out above and in particular the Healthcare Professional's advice to the Department of 16th January 2017 which specifically found:

At assessment he reported he can walk for about 50-100m before needing to stop due

to pain. In the Claimant Questionnaire he reported being able to walk 20-50m. The observations and MSK showed restriction consistent with the condition history, level of medication and clinical care. Although he reported being able to walk 50-100m this appears to be an over estimation of his ability. Due to his upper limb impairment the use of aids would be restricted. It is likely that he would be able to stand and walk for 20m but be limited to a distance of 50m reliably, repeatedly and safely in a timely manner.

In failing to explicitly address this conflict the tribunal was in error of law.

Third, the Tribunal did not put the lack of evidence in the medical notes and records to the Appellant to allow him to address their concerns in relation to this. This was a particularly serious failing given that the Tribunal was aware that the Appellant had not viewed the medical notes and records and given that the Appellant had no notice that this would be an issue.

Fourth, the Appellant specifically stated in evidence that he had better days and bad days but the Tribunal did not consider properly the applicability of Regulation 7 of the PIP Regulations (NI) 2016 to this Activity.

Fifth, the Tribunal placed too much weight on the Appellant's evidence that he could walk between 50 and 100m, and placed insufficient weight on Regulation 4 of the PIP Regulations (NI) 2016 and the Appellant's clear evidence that he could not do this repeatedly.

Sixth, the Tribunal's decision is inconsistent. On the final page of the Statement of Reasons the Tribunal states:

... the Tribunal still adhere to the finding that the Appellant's walking distance was not more than 20 but less than 50 metres and

the appropriate reasons have been provided for this.

As a result we submit that the tribunal has erred in its approach to mobility activity 2.'

14. In the Case Summary prepared for the oral hearing of the appeal, Mr Arthurs made the following submissions in response:

'Issue 1

It is clear from the record of proceedings and statement of reasons that (the appellant) was put on notice about the powers of the tribunal in relation to his award and he responded that he understood these powers. It remains my submission that the Tribunal gave (the appellant) sufficient notice of its powers to reduce the award of benefit and clearly explained the options that were available to him. (The appellant) decided that he did not wish to avail of the options but wished to proceed with the appeal, it is therefore my submission that the Tribunal has not erred as contended.

Issue 2

The Tribunal did not consider the potential for overwhelming psychological distress brought about by the pain he endures when mobilising. The appellant provided information supporting his claims but this was not addressed by the Tribunal, and it did not use its inquisitorial powers to gather more information. I would therefore agree with Mr McCloskey that the tribunal has erred in law.

Mr McCloskey goes on to refer to the judgement of the High Court of England and Wales [2017] EWHC 3375 which quashed the amendment made to the GB Personal Independence Payment Regulations 2013 by the Social Security Personal Independence Payment Regulations 2017 (SI 2107 No.94). The amendments reversed the effect of an Upper Tribunal Judgment MH v SSWP [206] UKUT 531 (AAC) where it was held that someone who cannot make a journey without assistance due to psychological distress should be scored in the same way as a person who needs assistance because they have difficulty in navigating a journey.

Similar amendments were made to the Personal Independence Payment Regulations (Northern Ireland)

2016 by the Personal Independence (Amendment) Regulations (Northern Ireland) 2017, SR 2017 No. 69

Whilst the relevant part of the GB Regulations were declared ultra vires and quashed there has been no similar declaration to the equivalent Northern Ireland legislation therefore it remains valid until declared otherwise by a Court of competent jurisdiction, see Tribunal of Northern Ireland Commissioners decision R1/05(IB) in support of this.

For completeness I would advise that the amendments made by SR 2017 No.69 have been reversed with effect from 15 June 2018 by The Personal Independence Payment (Amendment) Regulations (Northern Ireland) 2018. I would also advise that the Department has undertaken a special exercise to revisit cases that have been affected by the MH Judgment Issue 3

In relation to Mobility Activity 2 **Moving Around** it is contended that the Tribunal had erred by not giving the appellant an opportunity to respond to the allegation that there was insufficient medical evidence to support the award of 10 points. The Tribunal had also failed to allow (the appellant) an opportunity to view the medical records. It is accepted that the tribunal did not consider the issue of variability, as is required by Regulation 7 of the 2016 Regulations. It was also accepted that the Tribunal placed too much weight on the appellant's evidence that he could mobilise 50-100 metres but did not consider his ability to do this repeatedly based on the evidence available, therefore on these points the Tribunal has erred in law. There was, however, no evidence that the Tribunal had provided conflicting statements and this was likely to be as a result of poor drafting of its reasons, and on this point has not erred as contended.'

Errors of law

15. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
16. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered

errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

- “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
 - (ii) failing to give reasons or any adequate reasons for findings on material matters;
 - (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
 - (iv) giving weight to immaterial matters;
 - (v) making a material misdirection of law on any material matter;
 - (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...
- Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

Analysis

17. In *C15/08-09 (DLA)*, I addressed the powers of the appeal tribunal to make a decision which was less favourable to the appellant in the context of Disability Living Allowance (DLA). I analysed the relevant legislative provisions and applicable jurisprudence in paragraphs 54 to 60. In paragraphs 61 and 62 I stated:

’61. The principles which emerge from these cases can be summarised as follows:

- (i) an appeal tribunal is entitled to make a decision less favourable to the claimant than the decision under appeal;
- (ii) an appeal tribunal is entitled to supersede (or revise) the original decision on a ground which leads to a decision less favourable to the claimant than the decision under appeal;
- (iii) a less favourable award may also be made by an appeal tribunal which is considering an appeal against a decision of the Department on a renewal claim;
- (iv) the discretion of the appeal tribunal to make a less favourable decision is one to be exercised judicially, taking into account all relevant circumstances;

(v) if a statement of reasons for the appeal tribunal's decision is given, then the reasons for the exercise of the discretion should be set out;

(vi) the appeal tribunal must be satisfied that there has been compliance with the requirements of Article 6 of the European Convention on Human Rights and of natural justice;

(vii) compliance with the requirements of Article 6 includes the requirement that the appellant has had sufficient notice of the appeal tribunal's intention to consider making a decision which is less favourable, in order to enable the appellant properly to prepare his case;

(viii) the appellant is entitled to withdraw his appeal any time before the appeal tribunal's decision and this power may also be material to what Article 6 and the rules of natural justice demand;

(ix) appeal tribunals should refrain from making decisions less favourable to appellants than the decisions being challenged, except in the most obvious cases, or after an appropriate adjournment;

(x) the LQPM of the appeal tribunal is at liberty to draw any doubts about the validity of the decision to the Department's attention in the decision notice and can arrange for the parties to be sent a copy of the record of proceedings without them having to request it. That action would enable the Department to consider a supersession or revision (but see below).

62. The last principle was derived from the decision of Commissioner Rowland in *CDLA/884/2008*. With respect to the Commissioner, I do not agree with his conclusion. I would state the relevant principle to be:

(x) Where the appeal tribunal has any doubt concerning the validity of the decision under appeal, where that decision incorporates an existing award, it is under a duty to undertake a full investigation of the legitimacy of the existing award and determine whether that award is correct.'

18. In paragraph 63 I set out my justification for re-formulating principle (x). In paragraphs 65 and 66 I exhorted against a practice of formulating the requirement to ensure that the appellant has sufficient notice of the potential for the making of a less favourable award as a 'warning' at the outset of the appeal tribunal hearing. In paragraphs 67 and 68 I stated:

'67. To my mind, it is much more satisfactory for an appeal tribunal, when it has formed the view that it may exercise its discretion to make an award which is less favourable to the appellant, to begin by explaining to the appellant that the appeal tribunal is under a duty to consider all of the evidence which is before it and to ensure that the decision under appeal to it is correct. Thereafter, the appeal tribunal should inform the appellant of the appeal tribunal's *powers* and the appellant's *options*, in light of those powers.

68. What are the appeal tribunal's powers? They are:

- (i) to make a decision which is more favourable to the appellant (which in the vast majority of cases is what the appellant wants);
- (ii) to confirm the decision of the Department with respect to the existing award; and
- (iii) to make a decision which is less favourable to the appellant.'

19. In paragraph 71, I stated the following, about the appellant's options in light of the appeal tribunal's powers:

'71. What are the appellant's options, in light of the appeal tribunal's powers? They are:

- (i) to continue with the appeal tribunal hearing;
- (ii) to withdraw the appeal;
- (iii) as noted above and, as appropriate, to seek a brief adjournment to consider the implications of what has been described, or a longer adjournment to seek further legal advice in light of that description.'

20. In paragraph 73, I noted that it was important that a record of the explanations given by the appeal tribunal, in respect of its powers and the appellant's options is entered into the record of proceedings for the

appeal tribunal's hearing. Further I stated that where a statement of reasons for the appeal tribunal's decision is requested and given, then the reasons for the exercise of the discretion to make a decision which is less favourable should be set out. In paragraph 75, I observed that there were compelling reasons for recommending as safest and best practice, the giving of an explanation in each case where there is an existing award.

21 Finally, in paragraph 77 I summarised the position as follows:

Accordingly, in my view, it is safest and best practice for an appeal tribunal in each case where the decision under appeal incorporates an existing award:

(i) to explain to the appellant that the appeal tribunal is under a duty to consider all of the evidence which is before it, and to ensure that the decision under appeal to it is correct;

(ii) to outline to the appellant the powers available to the appeal tribunal which are:

- to make a decision which is more favourable to the appellant;
- to confirm the decision of the Department with respect to the existing award; and
- to make a decision which is less favourable to the appellant.

(iii) to outline to the appellant, the options available to him, which are:

- to continue with the appeal tribunal hearing;
- to withdraw the appeal at any stage prior to its determination;
- to seek a brief adjournment to consider the implications of what has been described, or a longer adjournment to seek further legal advice in light of that description.

(iv) to ensure that all explanations are provided in appropriate terms and language, and to be satisfied that the appellant understands the relevance and context of the powers of the appeal tribunal and the options available to him;

(v) to ensure that a record of the explanations given by the appeal tribunal, in respect of its powers and the appellant's options is entered into the record of proceedings for the appeal tribunal's hearing;

(vi) to ensure that where a statement of reasons for the appeal tribunal's decision is requested and given that the reasons for the exercise of the discretion to make a decision which is less favourable are set out;

(vii) to ensure that in a case determined on the papers alone and, where the appeal tribunal is considering exercising its judicial discretion to make a decision which is less favourable to the appellant, that it is satisfied that an appellant has had sufficient notice of the appeal tribunal's intention to consider making a decision which is less favourable, which will be likely to involve adjourning the appeal, and providing an appropriate description of the appeal tribunal's powers and the appellant's options in light of those powers.'

22. In *DM-v-Department for Social Development (DLA)* ([2010] NICom 335 ('*DM*')), Commissioner Stockman stated the following at paragraphs 9, 12 and 14 to 20:

'As this was a case which involved a removal of existing entitlement by a tribunal, I directed the applicant's representative and the Department to make further observations on the applicability of Commissioner's Decision C15/08-09(DLA) and in particular the compliance of the decision of the tribunal with the principles set out at paragraph 61 of that decision. The parties each made submissions to the effect that the tribunal had not complied with the principles of fairness set out in C15/08-09(DLA) in determining the appeal ...

I am more troubled by the fact that the applicant entered the tribunal room with an award of middle rate care and low rate mobility and left it with low rate care. The tribunal reduced his award on appeal. It is clear from the record of proceedings that his representative had advised him in a general sense of the tribunal's powers to reduce an existing award. It is also clear that the applicant

himself raised both the question of entitlement to mobility component and entitlement to care component in the appeal, by seeking higher awards of each.

In C15/08-09(DLA), Chief Commissioner Mullan set out some of the legal principles applying where a tribunal is determining an appeal and where it appears to the tribunal that the appellant's current award is not a correct award on the relevant facts and law. At paragraph 61 he summarises some of the principles arising from relevant case-law ...

In the present case, the Department did not dispute any aspect of the existing award. However, it appears that the appeal tribunal, upon seeing documentary evidence including the GP records, considered that this evidence placed a question-mark over the existing award.

Principle (vii) in the list above suggests that an appellant should be given sufficient notice of a tribunal's intention to make a less favourable award than the one he currently has. This enables him to seek adjournment to prepare further evidence to argue that element of his case, or to withdraw the appeal at any time up until the decision in the appeal is given.

While clear reference is made to the tribunal's powers having been explained in general terms, I consider that the specific basis on which a tribunal intends to reopen the question of an existing award requires to be put to the appellant. It is clear that the tribunal has satisfied itself that the applicant was aware of the general powers of the tribunal. The relevant part of the record of proceedings reads:

"Mr McGregor: I've seen the medical records.
It is High Rate Mobility and High Rate Care.
Current award in payment. I've advised him about that and happy to proceed.
Additional letters are past Date of Decision.
Nothing to add".

From this I take it that the tribunal had asked the representative whether he had seen the medical records, what components were in issue in the appeal and whether the applicant was aware of the powers of the tribunal to reduce or remove an existing award. However, there is no record of any statement to the effect that the

tribunal had particular doubts about the correctness of the existing award in the instant case, and was intending to consider a less favourable award. Nor is there a record of the tribunal highlighting to the applicant the specific evidential basis for the tribunal's doubts, which the applicant might require to address. This had the effect that the applicant was not alerted to any such issue, and the possible need to seek adjournment in order to obtain evidence to address it, or to whether, in the face of specific evidence, withdrawal might be a prudent course of action.

I consider that the requirement of "sufficient notice of the appeal tribunal's intention to consider making a decision which is less favourable" requires that the applicant should be alerted to specific evidence which the tribunal considers may lead to it making a less favourable decision, and thereby be given an opportunity to consider whether he requires an adjournment for further evidence on the issue, or whether he might wish to withdraw the appeal as permitted by regulation 40 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 ("the Decision and Appeals Regulations"). It is not evident from the record of proceedings that sufficient notice in this sense was afforded to the applicant.

The parties are agreed on this basis that the decision of the tribunal contains an error of law. In such a circumstance it is open to me to refer the case to a new tribunal under Article 15(7) of the Social Security (NI) Order 1998, without a specific finding that the tribunal has erred in law.

However, I consider that it is more appropriate for me to make my own decision to the effect that the tribunal has erred in law. I grant leave to appeal and, for the reasons I have given, under Article 15(8) of the Social Security (NI) Order 1998 I set aside the decision of the appeal tribunal.'

23. Except for some discussion about my disagreement with the original formulation of principle (x) in paragraph 61 of *C15/08-09 (DLA)* and my recasting of it, no doubt has been cast over the correctness of the principles in that decision or in *DM*. There are, accordingly, two aspects to the proper approach to the requirement that the appellant has had sufficient notice of the appeal tribunal's intention to consider making a decision which is less favourable.

24. The first is the need to draw the attention of the appellant, particularly an unrepresented appellant, to the appeal tribunal's powers and the appellant's options in light of those powers. That was what the practical guidance in paragraph 77 of *C15/08-09 (DLA)* was aimed at. The current President of Appeal Tribunals for Northern Ireland is to be commended for his proactive approach to this aspect of the 'sufficient notice' requirement by formulating and implementing a policy whereby in every DLA appeal involving an existing award, the LQPM of the appeal tribunal will inform the appellant of the appeal tribunal's powers and the appellant's options in light of those powers, using words and phrases which mirror the guidance in paragraph 77 of *C15/08-09 (DLA)* and ask that the appellant signs a document indicating that they understand what they have been told and setting out how they wish to proceed by choosing one of three options. The options are (i) to withdraw the appeal (ii) to seek an adjournment in order to obtain further advice from a representative and (iii) to continue with the appeal with full knowledge of the powers available to the tribunal in relation to the existing award. Option (ii) appears to be only applicable to unrepresented appellants but even where an appellant has a representative a short adjournment might be necessary in order to allow for further consultation.
25. All of what is entailed in the described policy usually takes place at the start of the appeal and it might be thought that once an appellant, as in the instant case, chooses option (iii) and indicates a wish to continue with the appeal that that is the end of the matter and the 'sufficient notice' requirement has been met. It is not the end of the matter and this is where the principles in *DM* come in. Those principles are about the proper approach when the intention to consider the possibility of making a less favourable award is triggered in the appeal tribunal's mind by some aspect of the evidence. An appeal tribunal will not consider its assessment of the evidence until it has heard and seen all of the evidence. At the outset of an oral hearing of the appeal it will have some evidence before it, which is (i) usually that contained in the appeal submission, (ii) sometimes further evidence adduced by the appellant and (although I realise that this has become more problematic) the evidence contained in the appellant's General Practitioner (GP) notes. The appellant may, or as in the instant case, may not have seen and considered the evidence in the GP notes. The evidential framework is completed with the appellant's own oral evidence or evidence of any witness which they adduce.
26. It is possible that on pre-hearing perusal of the evidence, including the GP records, the appeal tribunal is alerted to evidence which signals the tribunal to the possibility that the existing award is not appropriate and triggers consideration of the possibility of making a less favourable award. If that is the case, then the principles in *DM* mandate that the appellant is informed of that specific evidence and, as Commissioner Stockman put it, '... thereby be given an opportunity to consider whether he requires an adjournment for further evidence on the issue, or whether

he might wish to withdraw the appeal.’ When and how an appellant is alerted to what might be termed ‘unfavourable’ evidence noted in the pre-hearing perusal is for the appeal tribunal to decide in an individual case but caution needs to be exercised if the hearing begins with a presentation to the appellant of unfavourable evidence so as to prevent the impression that the appeal tribunal has made up its mind and forcing the appeal down the route of withdrawal.

27. It is equally possible that at the outset of the hearing, the tribunal has not identified any evidential basis to signal the tribunal to the possibility that the existing award is not appropriate but, rather, that evidence which is given during the course of the hearing – something said by the appellant or a witness, for example – which does provide an indication that the existing award is not appropriate and that a less favourable award is apposite. When that happens then the principles in *DM* are equally applicable. The tribunal's view on the relevance of the evidence to a potential review of the existing award needs to be put to the appellant in appropriate cautionary terms and, once again, the appellant must be given the opportunity to consider whether he/she wishes an adjournment to consider the evidence or to adduce further evidence or whether a withdrawal of the appeal is appropriate.
28. It is in this context that the interaction with the appellant at the start of the hearing is not the end of the matter. As was noted by Commissioner Stockman in *DM*, withdrawal during the course of an oral hearing is permitted by regulation 40 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999. It is my personal experience as a former LQPM that withdrawals have been sought during the course of an oral hearing, particularly by representatives, where evidence has been adduced which is suggestive that retention of an existing award is not appropriate. In those circumstances, however, and where a Departmental Presenting Officer is present, there exists the potential for a review of the correctness of the existing award through further Departmental decision-making. What may be necessary, however, is for the appeal tribunal to remind the appellant, during the course of the hearing, in suitable and advisory terms about what was said about the appeal tribunal's powers and the appellant's options in light of those powers at the outset of the hearing.
29. Although conceding that it is remote, there is the possibility that the appeal tribunal is alerted to evidence which signals to the appeal tribunal that the existing award is not appropriate in the post-hearing assessment. As an example, the Medically Qualified Panel Member (MQPM) may have noticed something about the evidence of the appellant or on further perusal of the GP records, which could not be drawn to the attention of the other tribunal members during the course of the hearing. In those unusual circumstances, and where the appellant remains physically present in the tribunal venue, then the hearing may have to be

recommended in order that the newly-noted evidence is drawn to the appellant's attention.

30. All of this analysis and guidance takes on particular significance in 'existing award' appeals where the appellant is unrepresented. The general principle (ix) in paragraph 61 of *C15/08-09 (DLA)* states that appeal tribunals should refrain from making decisions less favourable to appellants than the decisions being challenged, except in the most obvious cases. In not so obvious cases, caution has to be exercised, particularly where the appellant is unrepresented to ensure that the appellant is alert to both aspects of the 'sufficient notice' requirement, where relevant. It is apparent, that through the development of the President's policy, as outlined above, that the first aspect is catered for. I set out below how the appeal tribunal in the instant case dealt with that requirement. That includes, however, a commendation of a specific paragraph in the statement of reasons concerning the approach taken. Care has also to be taken that the second aspect and the guidance set out in *DM* is applied in the proper manner. In this regard, however, and with respect to a submission which was made by Mr Black in the instant case, I do not accept, as a general principle, that in every case, where the appellant is unrepresented and the appeal tribunal is alerted to evidence that might trigger consideration of the possibility of making a less favourable award, that an adjournment is mandated. All will depend on the individual circumstances of a case but I can envisage that certain unrepresented appellants will have the capacity to address the appeal tribunal's concerns about specific evidence, adduce their own evidence in connection with the issue and, where relevant, make a decision as to whether to seek an adjournment or withdraw the appeal.
31. Finally I have to say something about the proper approach in cases which are dealt with on the 'papers' alone. In sub-paragraph (vii) of paragraph 77 I stated that it was best and safest practice for appeal tribunals:

'(vii) to ensure that in a case determined on the papers alone and, where the appeal tribunal is considering exercising its judicial discretion to make a decision which is less favourable to the appellant, that it is satisfied that an appellant has had sufficient notice of the appeal tribunal's intention to consider making a decision which is less favourable, which will be likely to involve adjourning the appeal, and providing an appropriate description of the appeal tribunal's powers and the appellant's options in light of those powers.'
32. Part of that guidance has been superseded by the extension of the President's general policy, applicable to oral hearings of appeals involving an existing award to parallel 'paper' hearings. I have been provided with a copy of a form which is sent to appellants, in cases

involving an existing award, who have opted, through a separate exercise, to have their appeals determined without an oral hearing. The form contains information which is parallel to that given to appellants in parallel oral hearings and similar options are offered to them. There is, however, an additional option, which is to reverse the decision to opt instead for an oral hearing. It is creditable that appellants are informed that it is advisable that they do attend an oral hearing to provide their own oral evidence.

33. That deals with the first aspect of the 'sufficient notice' requirement. It does not address the second and what might be termed the '*DM*' requirement. Reviewing what was set out above about the proper approach to that requirement in oral hearings, the only additional evidence which might be before the appeal tribunal in 'paper' hearings is the appellant's GP records. It is unlikely that the appellant will have seen those records. In those circumstances, the guidance given above will be appropriate. Each case will turn on its own individual circumstances. I am of the view, however, that where an appeal tribunal, hearing a case on the papers alone, and with the benefit of the appellant's GP records, is alerted to something within those records which signals the tribunal to the possibility that the existing award is not appropriate and triggers consideration of the possibility of making a less favourable award, then an adjournment, framed in appropriate terms, to allow the appellant to consider the issue and the evidence underlying it and to review his/her own options, including adducing further evidence, and perhaps their own at an oral hearing, seeking independent advice or withdrawing the appeal, is likely to be necessary.

34. How do these principles apply in the instant case? It is important to note that the principles in *C15/08-09 (DLA)* and *DM* were developed in the context of DLA. Do they apply in the context of PIP? I have no hesitation in concluding that they do. The issue is the general one of an appeal tribunal giving consideration to making a decision which is less favourable to an appellant than the decision under appeal which is a matter which has an equal significance in the context of PIP as it does in DLA. Further, the President of Appeal Tribunals has extended the policy developed in the context of DLA, as set out in detail above, to PIP appeals involving an existing award of that benefit.

35. In the instant case, I am satisfied that the appeal tribunal applied the principles in *C15/08-09 (DLA)* and aspects of *DM* in the proper manner. In the record of proceedings for the appeal tribunal hearing, the following is recorded:

'Put on notice regarding present award. Didn't want to see his notes and records.'

36. More significantly, the statement of reasons for the appeal tribunal's decision contains the following paragraph:

'The appropriate wording on the appropriate form was read out to the Appellant by the Legally Qualified Tribunal Member at the commencement of the Tribunal. When this was read to the Appellant he was asked if he clearly understood the notice regarding the powers of the Tribunal and he replied that he did so understand and that he did not want to adjourn or seek representation but he wanted to proceed with the hearing on this basis. The Appellant was asked to sign the appropriate form but he claimed that he could not do this because of the splints in his hands which he was wearing and this in turn prevented him from doing anything with his hands. He was asked if he could make a mark of some sort on the form but he said that he could not even do this. In these circumstances therefore the Legally Qualified Member recorded the fact on the form that the Appellant had been put on notice of the contents of the form but that he could not sign same because he did not have the power in his hands to do this.'

37. 'The appropriate form' is the form which is utilised by appeal tribunals, as part of the extension to PIP by the President of Appeal Tribunals of the policy developed in relation to DLA and as set out above. A copy of the 'appropriate form' referred to by the LQPM is in the file of papers which is before me and it has been annotated as described by the LQPM in the statement of reasons. There is nothing material in the fact that the appellant was unable to do so. His inability was premised on physical problems with his hands necessitating the wearing of splints and had nothing to do with any difficulty in comprehending what he was being told and shown.
38. I have noted that the appeal tribunal had before it the appellant's GP and records and that the appellant declined to view the contents of those records. I have also noted that the appeal tribunal relied on evidence contained within the GP records in arriving at its conclusions as to whether the existing award of entitlement to the standard rate of the mobility component was appropriate. In the statement of reasons for the appeal tribunal's decision, the following is recorded:

'In addition to this there was a note in the records which did bring the Appellant's credibility with regard to evidence into contention regarding this particular aspect of the award. There is a note that after the Appellant had applied for PIP that he had slipped opening a heavy gate at work and this had caused an injury to his left knee. It was reported on 13 February 2017 that the Appellant's knee was still sore but that he had returned back to work. This note was inconsistent with the Appellant's evidence'

39. Applying the principles set out above, it was, in my view incumbent on the appeal tribunal to put the evidence contained in the GP records and the asserted inconsistency to the appellant for comment and this is precisely what the appeal tribunal did. The relevant paragraph in the statement of reasons continues as follows:

'When this was put to the Appellant he did say that he returned to work after this incident but this only entails sitting watching TV cameras from a security point of view and that he didn't have to walk through the premises. He had said that after the accident he had not been back to work since **but when again challenged** his evidence was inconsistent again and this inconsistency along with the medical evidence and the Appellant's own direct evidence to the Tribunal has convinced this Tribunal that the Appellant for the reasons given is not entitled to an award for standard rate mobility with regards to any inability to stand and move a distance between 20 and 50 metres.'

40. The emphasis in this quotation is my own. The veracity of the statement that an item in the GP records had been 'put' to the appellant can be checked by a cross-reference to the record of the proceedings for the appeal tribunal hearing. In the record of proceedings the following is recorded:

'Security – sitting watching TV cameras. Watch cameras. Don't have to walk premises. 5.00 am in the morning – went to open the gate – went over to barrier. Not back to work since. Too much, wouldn't be working.'

41. I am of the view that the appeal tribunal's approach to the specific item of evidence which it had found in the GP records, and which the appellant had not seen, and which was utilised by the appeal tribunal as part of a trigger to consider the appropriateness of the existing award, is wholly in keeping with the principles which I have set out above.

42. In the statement of reasons, the appeal tribunal also noted that during the course of an examination by a healthcare professional he had stated that he could walk for about 50-100 metres '... before having to stop and take a rest for a moment due to pain in his knees and feet etc before he could carry on.' The appeal tribunal then noted that this had again been 'put' to the appellant. Looking at the record of proceedings, the following is recorded:

'50-100 at that time yes. Yes could walk 50-metres. Pain constant. Stopping not repeatedly. Used to be lorry driver. Pain in feet constant.'

43. Once again, therefore, it appears that the appeal tribunal has taken the proper approach in drawing to the attention of the appellant an aspect of the evidence which was suggestive that the existing award of entitlement to the standard rate of the mobility component was not appropriate. That is not the end of the matter, however. In the statement of reasons there are detailed references to the appellant's GP records as follows:

'The Appellant has clearly stated in open Tribunal that at the time of the Assessor's examination he could walk between 50 metres but no more than 100 metres either aided or unaided. He did say that he couldn't do this repeatedly but there is no medical evidence before the Tribunal to suggest that this distance could not be completed repeatedly. All of the evidence points to the Appellant having significant joint pain affecting his MCP joints in his wrists and hands and on this basis of course he has been awarded the enhanced rate of the daily living component. There is reference in his notes to pain in his knees and feet. The Appellant completed his application form for PIP on 22.9.16. Five days later there is a reference in the medical notes and records to the Appellant having ongoing shoulder, wrist and hand pains and it was recorded that there was significant improvement with the Appellant taking the appropriate steroids. There is no mention however to any ongoing problems with the lower limbs as such which would significantly interfere with the Appellant's ability to stand and move around certain distances. There is a note in the records on 12 December 2016 that whenever the Appellant was examined there was ongoing evidence of symptoms across all of the MCP joints in both hands and wrists but there was no swelling of the knees and again no reference of any significant problems with pains in the lower limbs as such.'

44. This reasoning is, in my view, problematic in three respects. Firstly, there is a clear inconsistency between the statements that '... there is no medical evidence before the Tribunal ...', '... there is no mention however to any ongoing problems with the lower limbs.' and '... no reference of any significant problems with pains in the lower limbs' with a categorical statement that 'There is reference in his notes to pain in his knees and feet'. Secondly, there is no analysis as to how the appeal tribunal assessed the evidence that there was a reference in the GP records to the appellant having pain in his hands and feet and no resolution of the apparent conflict between that specific evidence and the other evidence which the appeal tribunal relied on to remove entitlement to the standard rate of the mobility component. Thirdly, and recalling that the appellant did not look at his GP records, the appeal tribunal, as was mandated by *DM*, has not put the relevance of the evidence to a potential

review of the existing award to the appellant in appropriate cautionary terms and the appellant was not given the opportunity to consider whether he wished an adjournment to consider the evidence or to adduce further evidence or whether a withdrawal of the appeal is appropriate. That is disappointing given that the appeal tribunal did alert the appellant to other evidence in the GP records which was unfavourable to him. It is the case, however, that the appeal tribunal's failures in this regard render its decision as being in error of law.

45. Having found, for the reasons which are set out above, that the decision of the appeal tribunal is in error of law, I do not have to consider the appellant's other grounds for appealing. In relation to the second ground of appeal I have noted that the Mr Black has confirmed that he was resiling from any argument concerning the lawfulness of amendments made to the 2016 Regulations. He did request, however, that I confirm the applicability in Northern Ireland of the decision of the three-judge panel in *MH v Secretary of State for Work and Pensions (PIP)* ([2016] UKUT 531 (AAC), [2018 AACR 12, ('MH')]. I decline to do so as the decision in *MH* is an important one and anything which I might say in this case about its applicability in Northern Ireland would obviously be *obiter*. In relation to third ground I agree that the appeal tribunal's statement that it adhered to '... the finding that the Appellant's walking distance was not more than 20 but less than 50 metres and the appropriate reasons have been provided for this' is clearly inconsistent with its earlier reasoning, findings of fact and decision of the relevant descriptor to be applied in connection with the mobility component. I am prepared, on balance, to accept that this is representative of an inattention to detail rather than reasoning sufficiently confused so as to amount to an error of law.

Disposal

46. The decision of the appeal tribunal dated 9 May 2017 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
47. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:
- (i) the decision under appeal is a decision of the Department dated 20 December 2016, as revised on 23 January 2017 in which a decision maker of the Department decided that the appellant was entitled to the enhanced rate of the daily living component and the standard rate of the mobility component of PIP from 30 August 2016 to 25 October 2019;
 - (ii) the appellant will wish to consider what was said at paragraph 77 of *C15/08-09 (DLA)* concerning the powers

available to the appeal tribunal and the appellant's options in relation to those powers;

(iii) the Department is directed to provide details of any subsequent claims to PIP and the outcome of any such claims to the appeal tribunal to which the appeal is being referred. The appeal tribunal is directed to take any evidence of subsequent claims to Disability Living Allowance into account in line with the principles set out in *C20/04-05(DLA)*;

(iv) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and

(v) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

(signed): K Mullan

Chief Commissioner

8 January 2020