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 24 August 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 Cookstown.

2. For the reasons I give below, I grant leave to appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I direct that the appeal shall be determined by a newly constituted tribunal in accordance with the directions given below.

REASONS

Background

3. The applicant had previously been awarded disability living allowance (DLA) at the low rate of the care component and the low rate of the mobility component from 30 December 2015 to 19 December 2017. As her award was coming to an end, she was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). She made a telephone claim from 4 September 2017 on the basis of needs arising from atrial fibrillation. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 6 October 2017. She was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 10 November 2017. On 21 November 2017 the Department decided that the applicant

did not satisfy the conditions of entitlement to PIP from and including 4 September 2017. The applicant requested a reconsideration of the decision, and she was notified that the decision had been reconsidered by the Department but not revised. She 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 24 August 2018 the tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 24 January 2019. 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 8 March 2019. On 8 April 2019 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The applicant submits that the tribunal has erred in law on the basis that:

   (i) It made a material mistake of fact regarding evidence of her tiredness;

   (ii) It failed to address the side effects of medication;

   (iii) It placed too much emphasis on her working 5.5 hours daily and driving 10 miles to work;

   (iv) She could not prepare and cook food due to tiredness;

   (v) It ignored evidence regarding inability to follow unfamiliar routes;

   (vi) Her condition is normally associated with older people;

   (vii) It did not specify which HCP report it relied upon.

6. 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 indicated that the Department did not accept that the applicant established an arguable case of error of law on the majority of her grounds. However, he accepted that the tribunal had arguably erred in law and that the Department supported the application on a basis related to the applicant's fifth ground above.

7. The applicant duly responded. Her comments were addressed to matters of fact and to the question of what weight the tribunal gave to two different HCP reports that were before it. She also attached a copy of a complaint she had made concerning the two HCP assessments.

8. Whereas the Department had accepted that there was a potential error of law in the tribunal's decision, I had concerns that the concession was

based on a misunderstanding of the relevant law. I issued a direction seeking submissions in response to specific questions. The applicant was invited to comment on the Department's response but she did not respond.

The tribunal's decision

9. The LQM has prepared a statement of reasons for the tribunal's decision. From this I can see that the tribunal had documentary material before it consisting of the Department's submission, containing the questionnaire completed by the applicant, two HCP reports, a GP factual report from the previous DLA claim and a supplementary advice note. The tribunal also had the applicant's medical records. The applicant attended the hearing and gave evidence.

10. The tribunal accepted that the applicant suffered from atrial fibrillation and a frozen shoulder at the relevant date. It addressed 6 disputed daily living activities (Preparing food, Taking nutrition, Managing therapy, Washing and bathing, Dressing and undressing and Engaging with other people face to face) and the two mobility activities. On mobility the tribunal found that the applicant worked in a call centre 10 miles from her home and drove there unaccompanied five days each week. It accepted, as had the Department, that the applicant satisfied descriptor 2(b) on the basis of physical tiredness restricting walking to between 50 and 200 metres. It did not accept that she could not plan and follow a journey. This led to an award of 4 points, which was insufficient to award mobility component.

11. On daily living, the tribunal did not accept that tiredness prevented the applicant from preparing and cooking food, but accepted that she would need an aid such as a perching stool to sit due to tiredness, awarding 2 points. It found that she would similarly need an aid or appliance to wash or bathe, awarding 2 points. On her own evidence the applicant indicated that she could manage her own medication, could take nutritional appropriately, had no difficulty with dressing and could engage with other people. This led to a total award of 4 points which was insufficient to award daily living component.

Relevant legislation

12. 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.

13. 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 clamant who obtains a score of 12 points will be awarded the enhanced rate of that component.

14. In this case the Department has accepted that there may be an error of law in relation to mobility activity 1 and therefore it is helpful to set this out. At the relevant date (21 November 2017), following an amendment made on 20 April 2017, this provided:

Activity	*Descriptors*	*Points*
1. Planning and following journeys.	a. Can plan and follow the route of a journey unaided.	0
	b. Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant.	4
	c. For reasons other than psychological distress, cannot plan the route of a journey.	8
	d. For reasons other than psychological distress, cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10
	e. Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant.	10
	f. For reasons other than psychological distress, cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.	12

15. As will be outlined below, the legislation was amended to remove the words “For reasons other than psychological distress,” from descriptors 1(c), 1(d) and 1(f) from 15 June 2018.

Assessment

16. 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.

17. 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.

18. 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.

19. It appears to me that the general submissions of the applicant relating to the tribunal's findings of fact do not raise arguable errors of law.

20. Firstly the applicant disputes the tribunal's finding of fact in relation to tiredness. This was a question of fact for the tribunal that can only be challenged on grounds of irrationality – in other words if it was based on no evidence or else the evidence compelled a different conclusion. Having reviewed the evidence, I consider that the tribunal was entitled to make the findings that it did on the material before it.

21. Secondly, the applicant submits that the tribunal did not consider the side effects of her medication – namely tiredness, headaches and heartburn. I note that the side effects of medication were stated to the HCP on 17 November 2017 to be tiredness and migraine headaches and that the applicant further referred to swelling of feet in her PIP2 questionnaire. It appears to me that none of these side effects were expressly raised by the applicant in oral evidence, but the aspect of tiredness was considered generally. The tribunal found that it was not as limiting as stated by the applicant, and this conclusion was open to it.

22. Mr Williams for the Department had pointed out that headaches were reported to the HCP on 2 May 2018 as occurring once every 6-8 weeks. I accept his submission that even though these were not addressed expressly by the tribunal, the frequency would not have had a material effect on the outcome of the appeal. The tribunal asked the applicant generally about functional difficulties, and it does not appear that any other medication side-effects were reported by her as significant to her physical or mental functioning.

23. Thirdly, the applicant challenges the tribunal's focus on her ability to work. However, I consider that the tribunal was entitled to take the applicant's work into account in terms of how she journeyed to work and to what extent the tasks involved in her work shed light on the daily living activities. It appears that the tribunal considered the applicant's ability to drive 10 miles to work each day and back as relevant to mobility activity 1, and it was entitled to do so. It has addressed each of the daily living

activities on its own merits and has not drawn any adverse inference from the fact of the applicant working.

24. Fourthly, the applicant challenges the tribunal's findings in relation to daily living activity 1 (Preparing food). I consider that the tribunal was entitled to make the findings that it did, and no arguable error of law arises.

25. Fifthly, the applicant submits that the tribunal erred in relation to her ability to follow unfamiliar routes, submitting that she lost confidence in driving. As indicated above, Mr Williams for the Department noted that whereas there was evidence before the tribunal of the applicant's ability to drive on familiar routes, the tribunal did not have evidence of the applicant's ability to manage unfamiliar routes. He said:

    The tribunal has considered [the applicant]'s ability to drive 10 miles to work in deciding that she is able to plan and follow journeys. However, [the applicant] contends that since an accident she has to rely on family to undertake unfamiliar journeys and therefore the tribunal has erred by ignoring the evidence and choosing the incorrect descriptor.

    I have noted that in her PIP2 questionnaire [the applicant] stated that she relies on her family when she is going out and that they would plan the journey for her to avoid her getting anxious or distressed.

    In her mandatory reconsideration request dated 12/1/18 [the applicant] stated that she is able to make short, familiar journeys but that she relies on her husband and daughter if going anywhere unfamiliar. She also stated that driving makes her tired and following an accident in 2004 being in a car causes her distress. [The applicant] stated that she needed prompting to undertake any journey to avoid overwhelming psychological distress. In her appeal request dated 21/02/18 [the applicant] again referred to the fact that her journey to work is a familiar one which requires no planning. Furthermore, [the applicant] indicated that the reference to her mental health in respect of this activity was not relevant.

    In the medical reports dated 7/11/17 and 2/05/18 the Disability Assessors both concluded that [the applicant] was able to plan and follow a journey, noting that there was no evidence of any mental health condition that would impact on this activity and that she was able to drive to work.

    The tribunal concluded that [the applicant] was capable of planning and following journeys and therefore that Mobility descriptor 1.a. was appropriate, *'Can plan and follow the route of a journey unaided.'* At the hearing [the applicant] reported to the tribunal that she *"could manage diversion on a road that she knows but is afraid of big roads because of an accident and also issues regarding her condition."*

In reaching this decision the tribunal has recorded in its statement of reasons:

> *"18. In relation to planning and following journeys, the Appellant indicated that she could manage okay but wouldn't drive long distances due to lack of energy. At the oral hearing she stated that she was fearful of driving as she had been in an accident in 2004. Taking into consideration the Appellant's daily driving tasks, lack of treatment for any mental health condition, our conclusions with respect to the effect of her tiredness, and the totality of the medical evidence available, the Tribunal did not feel that an award of points was merited in relation to this descriptor."*

I would consider that there may be merit in [the applicant]'s contention that the tribunal has failed to adequately investigate this activity. [The applicant] has consistently stated that she can drive to work but that she cannot undertake any other unfamiliar journey by herself. Although the tribunal has referred to [the applicant]'s lack of treatment for any mental health problems, I am concerned about its failure to question [the applicant] on the effects of her previous car accident and also by not exploring the possibility of her suffering from overwhelming psychological distress if she were to undertake any unfamiliar journey alone, as she has contended. In addition, if [the applicant] has stated that she is unable to drive to unfamiliar places it would have been helpful had the tribunal explored her ability to use public transport.

Although it is possible that the tribunal was ultimately correct in its choice of descriptor, I would suggest that it has failed in its inquisitorial duty and also has failed to adequately explain why it has concluded that [the applicant] is capable of Mobility Activity 1.

26. As indicated above, I considered that the Department might have based its submissions on a misunderstanding of the law. There is a degree of difficulty associated with the particular activity in the period in issue, following amendments to the legislation in Northern Ireland and Great Britain, and a judicial review challenge to the Great Britain amendments.

27. Specifically, in Northern Ireland, mobility activity 1 was amended from 20 April 2017 by regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017. For the word "Cannot" in paragraphs (c), (d) and (f) were substituted the words "For reasons other than psychological distress, cannot". The equivalent amendments were made in Great Britain at the same time.

28. However, in the decision of the Administrative Court in England and Wales in RF and others v Secretary of State for Work and Pensions [2017] EWHC 3375, the equivalent amendment in the Great Britain version of the regulations was declared *ultra vires* on 21 December 2017.

This had the effect that those regulations ceased to have force and to be applied in Great Britain. However, the judgment of the Administrative Court had no effect in Northern Ireland. The regulations continued in effect here, until the equivalent amendment in Northern Ireland was reversed from 15 June 2018 by regulations 2 and 3 of the Personal Independence Payment (Amendment) Regulations (NI) 2018. These substituted the original wording by regulation 2 and revoked regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017 by regulation 3.

29. In the light of this complexity, I issued a direction to the Department to address certain questions. The Department responded as follows, setting out my questions and the response:

    1. "What was the date of the decision under appeal?

    The date of the decision under appeal is 21 November 2017.

    2. What was the form of the Mobility activity 1 that the tribunal was required to apply in determining the appeal from a decision made by the Department during the period from 20 April 2017 to 15 June 2018?

    Mobility Activity 1, Planning and Following Journeys, was subject to an amendment by Regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017 on 20 April 2017. Where previously descriptors (c), (d) and (f) read:

    (c) Cannot plan the route of a journey

    (d) Cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid

    (f) Cannot follow the route of a familiar journey without an another person, assistance dog or orientation aid

    Regulation 2(4) had the effect where, in descriptors (c), (d) and (f), the word *'cannot'* was substituted by the words *'for reasons other than psychological distress, cannot'*. The effect of this amendment was that a decision maker (inclusive of an Appeal tribunal) could not consider psychological distress as a means of qualifying for points under the above descriptors. Psychological distress was only to apply to descriptors (b) and (e) which read (and continue to read) as follows:

(b) needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant;

…

(e) cannot undertake any journey because it would cause overwhelming psychological distress to the claimant

This amendment was reversed with effect from 15 June 2018 in Northern Ireland by regulations 2 and 3 of the Personal Independence Payment (Amendment) Regulations (NI) 2018 (2018; No. 121). This means that for the period 20 April 2017 until 14 June 2018 any decision maker had/has to apply the legislation as it stood at that time, meaning all decisions relating to psychological distress could not be considered within the scope of descriptors (c), (d) or (f) but could within the scope of (b) or (e).

3. Does this have any bearing on the observations hitherto made by the Department and in particular on the possible application of descriptors 1(c), (d) and (f)?

In our response of 15 May 2019 we addressed, in Issue 4, the matter of overwhelming psychological distress in relation to Mobility activity 1 as follows:

> *"…Although the tribunal has referred to [the applicant]'s lack of treatment for any mental health problems, I am concerned about its failure to question [the applicant] on the effects of her previous car accident and also by not exploring the possibility of her suffering from overwhelming psychological distress if she were to undertake any unfamiliar journey alone, as she has contended. In addition, if [the applicant] has stated that she is unable to drive to unfamiliar places it would have been helpful had the tribunal explored her ability to use public transport.*
>
> *Although it is possible that the tribunal was ultimately correct in its choice of descriptor, I would suggest that it has failed in its inquisitorial duty and also has failed to*

> *adequately explain why it has concluded that [the applicant] is capable of Mobility Activity 1."*

> In short, it was our position that the Tribunal should have given consideration to the overwhelming psychological distress in relation to unfamiliar journeys as [the applicant] had indicated that she did not suffer same on familiar journeys. However if the Tribunal was expected to consider this as the conditions in effect during the period 20 April 2017 until 14 June 2018 (as stated above [the applicant]'s decision is dated 21 November 2017) then the tribunal could only consider overwhelming psychological distress in relation to descriptors (b) and (e), and not in relation to (c), (d) or (f).

> Therefore we resile from our previous position that the Tribunal has erred in law and we do not believe that [the applicant] could arguably be awarded points under any Mobility activity 1 descriptor".

30. It appears to me that on the law as it was at the date of decision, the tribunal was not able to address any psychological issues relevant to the applicant's ability to follow the route of an unfamiliar journey. This may well be different after 15 June 2018. However, it means that I do not accept that the tribunal has arguably erred in law on this ground.

31. Sixthly, the applicant submitted that the effects of her condition are normally associated with older people. This does not raise an arguable error of law.

32. Finally, the applicant submitted that the tribunal had not made clear which of two different HCP reports they were relying on. It appears to me that a further arguable issue arises here.

33. The issue arising is that the applicant was first examined by a HCP on 7 November 2017 without a mental health examination. The decision of 21 November 2017 disallowing her claim was based on that report. However, two matters were identified by a HCP in a supplementary advice note as problematic in relation to that report. Firstly, no previous DLA evidence had been seen by the HCP, and secondly no mental health examination had been conducted, whereas matters relating to anxiety and stress were apparent from the DLA evidence. The applicant was subsequently examined on 2 May 2018, including a mental health examination, and the HCP report of that date was also before the tribunal.

34. The relevance of this issue is that post-decision evidence is not admissible in tribunal proceedings by virtue of Article 13(8)(b) of the Social Security (NI) Order 1998 unless it addresses the circumstances

obtaining at the time when the decision under appeal was made. The applicant submits that it is unclear which report the tribunal relied upon. Whereas that is not entirely valid as a submission, it appears that there are nevertheless potential errors of law arising.

35. In relation to the applicant's physical condition, it is evident from the statement of reasons that, when addressing the applicant's physical condition, the tribunal referred to the HCP report dated 17 November 2017. It expressly refers to the date of the report and refers to a comment by the HCP at paragraph 19 of the statement of reasons that appears at page 7 of the first HCP report. At paragraph 20 of the statement of reasons it clearly refers to the second HCP report dated 2 May 2018, as that was the only report that contained a mental health examination.

36. I issued a direction to the Department to make observations on the following questions:

    (i) It appears from paragraph 20 of the statement of reasons that the tribunal placed weight upon the healthcare professional's report dated 2 May 2018; was the tribunal entitled to place weight on this report in the light of Article 13(8)(b) of the Social Security (NI) Order 1998?

    (ii) In particular, is there anything in that report to suggest that it referred to circumstances at the date of the decision under appeal as opposed to the date of examination?

    (iii) Was reliance on the report of 2 May 2018 material to the outcome of the appeal?

    (iv) Even if the tribunal relied upon the oral evidence of the applicant and other medical evidence in reaching its decision, does reliance on the report affect the fairness of the proceedings?

37. Ms Patterson duly responded and, addressing questions (i) and (ii), she submitted that the HCP conducting the mental state examination on 2 May 2018 observed and analysed the applicant on the day of the assessment. Consequently, she submitted that the tribunal was not permitted to take account of the medical report dated 2 May 2018 and therefore had erred in law.

38. In response to the question as to whether reliance on the report was material to the outcome of the appeal, Ms Patterson submitted that reliance of the report did not make a material difference to the outcome of the appeal as the tribunal does not place significant weight on, or rely on, the report.

39. However, Ms Patterson submitted that reliance on the report dated 2 May 2018 did affect the fairness of the proceedings. She indicated that the

second medical assessment was carried out due to Capita advice that the initial assessment was inadequate, partially insofar as it did not include a mental state examination. She submitted that the tribunal should have exercised its inquisitorial role further, questioning Mrs M… on the effects of her fears and anxiety experienced in relation to the relevant activities at the date of decision, in order to provide robust reasons for its decision. While this is something of a technicality, it is not possible to say that it would not materially have affected the fairness of the appeal and possibly its outcome. I must concur with the submission of Ms Patterson.

40. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I direct that the appeal shall be determined by a newly constituted tribunal.

41. The new tribunal shall have particular regard to the fact that it may not consider circumstances not obtaining at the date of the decision under appeal. To the extent that it relies upon the report of 10 April 2018, the new tribunal must determine whether or not the findings of that report were equally relevant to the circumstances obtaining on 21 November 2017.

(signed): O Stockman

Commissioner

11 March 2020