

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 25 July 2019

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 Belfast.
2. An oral hearing of the application has not been requested.
3. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal 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

4. The appellant was awarded disability living allowance (DLA) from 1 October 1992, most recently at the high rate of the mobility component and the low rate of the care component from and including 19 December 2002. As his award of DLA was due to terminate he was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). He made a claim from 8 March 2018 on the basis of needs arising from Fallot's tetralogy, congenital heart disease, back pain, leg cramps, breathlessness and low mood. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 9 April 2018. The Department obtained a general practitioner (GP) factual report on 11 May

2018. The appellant was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 30 May 2018. On 11 June 2018 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 8 March 2018. The appellant requested a reconsideration of the decision, submitting further evidence including a cardiologist's letter. While he was awarded more points on revision, he was notified that the decision had been reconsidered by the Department but not revised. He appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 25 July 2019 the tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 27 September 2019. 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 24 October 2019. On 30 October 2019 the appellant applied to a Social Security Commissioner for leave to appeal.

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 has not explained why the appellant was not awarded mobility component despite having received DLA mobility component for several years;
 - (ii) it has placed weight on an immaterial matter – namely the appellant's ability to drive – when assessing his mobility.
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 not materially erred in law on the basis submitted by Mr Black. However, he indicated that the Department supported the application on an alternative basis.
8. In response, Mr Black maintained his submissions, and endorsed the Department's identification of an error of law on the alternative basis it had identified.

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 PIP2

questionnaire completed by the appellant, a general practitioner (GP) factual report obtained for DLA purposes, a consultation report from the HCP and two GP factual reports prepared for PIP, along with a data print from GP records, a supplementary medical report and a letter from a cardiology clinical nurse specialist. The tribunal further had a submission from the appellant's representative appealing the decision of Upper Tribunal Judge Markus in *PS v Secretary of State for Work and Pensions* [2016] UKUT 326, and medical evidence from the appellant's GP records. The appellant attended the hearing and gave oral evidence, represented by Mr Hughes. The Department was represented by Mrs Murphy.

10. The tribunal accepted that the appellant had a congenital heart condition, with some back pain and right ankle pain. It noted that in April 2017 he underwent major cardiac surgery to have his pulmonary valve replaced with an artificial one, and experienced acute renal failure and pneumonia during recovery. A nurse specialist's evidence dated July 2018 was that the appellant became breathless and experienced pain after walking 20 yards. The tribunal also found that the appellant had been attending a clinical psychologist due to stress and anxiety associated with his cardiac condition. The HCP had noted that the appellant stated that he was limited to 20 yards walking, but gave the opinion that he could probably manage more than 200m walking, observing no evidence of breathlessness.
11. The tribunal was influenced by the appellant's employment as a bus driver. It found that this was at odds with the evidence of the nurse specialist who had reported that he required round the clock supervision and help from his wife and family on a day to day basis. While noting that employment did not preclude entitlement to PIP, the tribunal found that the nature of his employment suggested a greater level of functional ability than described by the appellant. It found no evidence of a disabling back condition, an ankle or circulatory problem. It found no evidence to support mental health restrictions, while accepting that the appellant was understandably anxious about his condition. It found that an award of 4 points for mobility activity 2(b) and 4 for daily living activities 1(b) and 4(b) was appropriate.

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

Assessment

14. 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.
15. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
16. 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.
17. Mr Black firstly submits that the tribunal has not explained why the appellant was not awarded mobility component despite having received DLA mobility component for several years. He secondly submits that it has placed weight on an immaterial matter – namely the appellant’s ability to drive – when assessing his mobility. These are arguable grounds and I grant leave to appeal.
18. I have, however, dealt with the first of the grounds in a number of cases. For convenience I will set out my treatment of this issue in the case of *LMcC-v-Department for Communities* [2020] NI Com 19, at paragraphs 23 to 36:

“Reasons and previous DLA award

23. I have previously addressed this point in the case of *JF v DfC*, in which Mr Black also appeared. In the present case, Mr Black questioned the correctness of my approach in *JF v DfC* and its consistency with the decision of Deputy Commissioner Wikeley in *DC v DfC*. He submitted that a Tribunal of Commissioners or a decision by the Court of Appeal would be necessary to resolve the conflict in these decisions. I will therefore firstly reiterate my reasoning in *JF v DfC* and then address whether it is consistent with *DC v DfC*.

24. The decisions in *JF v DfC* and *DC v DfC* are directed to the standard of reasons required from a tribunal when, in a case such as the present one, a claimant who had previously enjoyed an award of DLA high rate mobility component has been refused an award of PIP mobility component. They address the extent to which the principles set out by Great Britain Commissioner Howell in *R(M)1/96* - a case where a DLA fixed term award was not renewed at the same rate as before, with connotations of inconsistency - extend to cases where PIP was not awarded to a claimant who previously enjoyed a DLA award. Each of the cases also referred to the decisions of Great Britain Upper Tribunal judges in *YM v Secretary of State for Work and Pensions* [2018] UKUT 16 and *CH and KN -v- Secretary of State for Work and Pensions* [2018] UKUT 330 (AAC).

25. In *obiter* remarks in *YM v SSWP*, Upper Tribunal Judge Ward had said in the context of whether *R(M)1/96* applied:

“11. What is trickier is when two awards may be judged to be inconsistent. The situation where the rules of the benefit remain the same and the claimant’s condition has remained the same or worsened is straightforward: if a later decision differs from the decision preceding it, then compliance with *R(M)1/96* will be necessary.

12. Where a benefit is changed, such as from incapacity benefit to employment and support allowance or, as in this case, from DLA to PIP, in my view for the reasons below it is not enough on the one hand to point to the law having changed and to claim that as a result an earlier decision is of no consequence and need not be addressed. However, nor is it enough to say, in effect, that a claimant was awarded the benefit intended for e.g. (as here) people with disabilities under a predecessor benefit and so any decision that s/he does not qualify under the successor benefit must necessarily be inconsistent, for there will be many cases when the predecessor benefit is based on an entirely different approach. What is required on the part of the FtT is a

degree of analysis as to the potential for a genuine inconsistency...”

26. Judge Ward went on to give some examples. Among these, at paragraph 13, was the high rate mobility component of DLA. He explained that in Great Britain “the borderline between qualifying and not qualifying is thus a somewhat flexible one, but 50 yards or, as it appears to have become without comment, 50 metres, has in my experience and that of others been taken as something of a benchmark”. At paragraph 21 he said, “I am not intending to set down a rule of law beyond that where the conditions on which a previous award of a different benefit was made are reasonably capable of being material to whether the conditions for the award of a subsequent benefit are met, where there is an apparently divergent decision on the subsequent benefit, R(M)1/96 should be applied”.

27. In *CH and KN -v- SSWP*, Upper Tribunal Judge Markus addressed two questions. The first question is not controversial in the present proceedings – it is common case that a claimant is entitled to have relevant evidence from the previous DLA award set before the PIP decision maker. The second question was how, if at all, do the principles in *R(M)1/96* apply to a tribunal’s duty to give reasons in cases involving transfer from DLA to PIP. In addressing the two questions, Judge Markus conducted an analysis of similarities and differences between DLA and PIP. She endorsed the words of Judge Ward in the context of finding parallels between DLA and PIP when she said:

“13. In *YM v Secretary of State for Work and Pensions (PIP)* [2018] UKUT 16 (AAC) at [12] to [17] Judge Ward discussed potential overlap between the DLA test of being “virtually unable to walk” and some of the PIP mobility descriptors. Both tests are about walking, in practice, inability to walk more than 50 metres is relevant both to entitlement to the HRMC of DLA and to the standard rate of the mobility component of PIP...”

28. Judge Markus in *CH and KN -v- SSWP* further held at paragraphs 78-80:

78. That aspect of the decision in YM was obiter, but it contains a careful analysis and considered conclusion. Contrary to Ms Leventhal's submission, Judge Ward addressed not only the areas of potential overlap between the two benefits but also a number of substantive differences, in particular at [14] – [17] and [20]. He did not consider the procedural differences applying to the two benefits, but that does not undermine his reasoning. Differences in the assessment processes might affect their quality and weight in a particular case but that is for a tribunal to evaluate where the issue arises.

79. I reject Ms Leventhal's submission that the procedural and substantive differences between the two benefits mean that any perception of inconsistency between awards is entirely a result of the individual's lack of understanding of those differences. In the light of the areas of overlap between the two benefits it is obvious why in some cases it might be thought that the functional limitations giving rise to an award of DLA at a particular level might, all other things being equal, give rise to an apparently comparable award of PIP. Judge Ward's analysis amply illustrates this. Moreover, this submission fails to grapple with one important aspect of the role of reasons, which is to avoid perceptions of unfairness or feelings of injustice (see R(M)1/96 at [15]).

80. Ms Leventhal's next submission was that that awards could not be seen as inconsistent unless there is "a very large degree of overlap" such as between the DLA test of being virtually unable to walk and PIP mobility descriptor 2c or higher, and the condition must not have changed or must have deteriorated and must not be a fluctuating one. I agree that inconsistency will not arise where the relevant condition has improved since the DLA assessment, as was made clear by Commissioner Howell in R(M)1/96. Other than that, I do not

consider that Ms Leventhal's submission clarifies the application of the principle. The terminology of "a very large degree of overlap" is too imprecise to be meaningful. Nor, is it possible to specify exhaustively which areas of overlap would call for an explanation. Judge Ward identified some areas of potential overlap. I agree with him that there may be others. Ms Parker's table is sufficient to indicate as much. Accordingly, I agree with Judge Ward's approach at [21] of YM in setting out the principle but no rule of law beyond that. It is for the tribunal to judge in the circumstances of the particular case whether there is an apparent inconsistency such that reasons are called for.

29. I differ in my approach from Judges Ward and Markus, and the difference arises from my analysis of when inconsistency appears between DLA high rate mobility and PIP mobility decisions. The present case concerns the requirement to give reasons when a claimant, who has previously enjoyed an award of the DLA high rate mobility component, is not awarded the mobility component of PIP. The same issue was addressed by Upper Tribunal Judge Wright in *AW v Secretary of State for Work and Pensions* [2018] UKUT 76, in a decision which built on the principles accepted in *YM v SSWP* and *CH and KN -v- SSWP*, and which further relied on the decision of the Court of Appeal in England and Wales (EWCA) in *R(Sumpter) v Secretary of State for Work and Pensions* [2015] EWCA Civ 103. I explained my reservations in my decision in *JF v DfC*, from which I set out paragraphs 25-32 below.

25. Mr Black's principal submission was that the tribunal has not explained its decision on the mobility component sufficiently in the light of the past decision awarding DLA high rate mobility component. He relied, inter alia, on the decision of Upper Tribunal Judge Wright in *AW v SSWP*, who referred in turn to the decision of the Court of Appeal in England and Wales in the judicial review appeal of *R(Sumpter) v Secretary of State for Work and Pensions* [2015] EWCA Civ 103. Mr Black submitted that this decision inferred a rule of thumb that the appellant's

walking distance without severe discomfort was limited to 50 metres. He submitted that this would equate to descriptor 2.c or 2.d and lead to a higher award of points than the 4 for descriptor 2.b that the tribunal actually awarded.

26. *Sumpter* was a judicial review addressed to the lawfulness of the 2013 Great Britain equivalent of the 2016 Regulations, and in particular the consultation process that took place in Great Britain before their introduction, with particular reference to the thresholds for entitlement to the mobility component. The details of the case are not directly of relevance. However, in *Sumpter* in the EWCA, McCombe LJ said at paragraph 4:

“... The higher rate was awarded to those who were “virtually unable to walk” and it had come to be accepted (as we were informed by counsel, as a result of decisions before the Commissioners and later in the Tribunals) that a claimant would usually satisfy this test if he or she was unable to walk more than 50 metres...”

McCombe LJ further said at paragraph 6 that:

“... the criteria for payment of the enhanced rate impose a threshold condition that the claimant cannot walk more than 20 metres, rather than the 50 metre “rule of thumb” that had become the norm under DLA. While that “rule” was not (as such) statutory, it had become the understanding or lore in the field that 50 metres was the qualifying criterion”.

27. I am not bound by the EWCA. However, I would normally consider the decision of the EWCA highly persuasive to the extent that I should follow it, in accordance with the principle in *Carleton v DHSS* [1988] 11 NIJB 57. Nevertheless, whether or not the above statement reflects the position in England and Wales accurately, I consider that it does

not accurately reflect the position in Northern Ireland, based on my experience as a Commissioner for 8 years and as a tribunal legal member for 9 years before that. I observe the comments of Upper Tribunal Judge Ward at paragraph 13 of *YM v Secretary of State for Work and Pensions* [2016] UKUT 16 and of Upper Tribunal Judge Marcus at paragraph 13 of *CH and KN v Secretary of State for Work and Pensions* [2018] UKUT 330 and conclude that this may well have been an established practice in Great Britain. However, what was said in *Sumpter* and the Upper Tribunal cases was based on evidence relating to Great Britain. I respectfully distinguish this from the position in Northern Ireland.

28. Under regulation 12 of the Social Security (Disability Living Allowance) Regulations (NI) 1992, it might have been open to a tribunal to have found that someone who could not walk more than 50 metres was virtually unable to walk. However, the relevant jurisprudence emphasises that the factor of distance in addressing virtual inability to walk is only one factor among four (speed, time and manner of walking being the others).

29. What is meant by “virtually unable to walk” is a question of law. Therefore, Commissioners have avoided laying down distance benchmarks that do not appear in the legislation. They have dealt with challenges to tribunals decisions on the basis that they go beyond the boundaries of reasonable decision making. Thus, in R(M)1/78 it was held that no persons acting judicially and properly instructed as to the relevant law could have found that a child with epilepsy and cerebral palsy who could walk a mile was virtually unable to walk, overturning the tribunal’s decision. At the other end of the spectrum, in R(M)1/91 a tribunal decision that declined to accept that a walking limitation of 100 yards represented virtual inability to walk revealed

no error of law. I agree with Commissioner who held in CDLA/717/98 that:

“it is not for a Commissioner to attempt to lay down a precise formula for determining whether or not a claimant is unable to walk when the legislation does not do so. The legislation allows adjudication officers and tribunals a margin of appreciation”.

30.I am aware that the Northern Ireland Commissioners have tested this principle. For example, Mrs Commissioner Brown in C20/05-06(DLA) was to some extent prescriptive when she said:

16.In the present case, as regards the mobility component, the instant tribunal's finding was of a walking ability of at least [my emphasis] 100 yards before the onset of severe discomfort. As I indicated above 100 yards is a walking distance (assuming reasonable factors of speed, manner and time of walking) which would entitle a tribunal to conclude that a claimant was not virtually unable to walk. It is unlikely that this amount of walking ability could reasonably be considered as virtual inability to walk though it must be remembered that Parliament has not seen fit to prescribe actual distances, times etc. which can or cannot qualify as being virtually unable to walk. However (R(M)1/91) the baseline is total inability to walk which is extended to take in people who can technically walk but only to an insignificant extent. Therefore, it is only very, very severe walking restrictions which will qualify as virtual inability to walk. I do not think that the above-mentioned walking ability could be so considered and it is unlikely that a tribunal would consider such walking ability to be virtual inability to walk.

31.I am also aware of one Northern Ireland Commissioner's decision having referred to a tribunal applying a 50 metre rule of thumb. In that decision Chief Commissioner Mullan did not need to consider the lawfulness of

that approach (see paragraph 16 of the in *LL v Department for Communities* [2017] NI Com 51). However, while at least one tribunal in Northern Ireland has applied a rule of thumb in DLA mobility appeals, it seems clear to me that tribunals generally should not follow such an approach for the distance factor of DLA mobility component.

32. If a decision of a tribunal deciding a DLA high rate mobility component appeal came before me and it appeared that the tribunal was applying a “50 metre rule”, I would be likely to hold its decision erroneous in law on the basis that it was fettering its own discretion and failing to address all relevant factors. For these reasons, it appears to me incorrect to link, as the EWCA has done, the fairly precisely prescribed mobility conditions of PIP to those of the DLA mobility component, which permit a much greater margin of appreciation.

30. In short, whereas the Upper Tribunal judges have been content to presume an inconsistency between a previous award of DLA high rate mobility component and a subsequent award of points under PIP descriptors 2(a) or 2(b), I do not accept that there is any automatic inconsistency. Firstly, the award of high rate mobility component was most commonly made under regulation 12(1)(a)(ii) of the DLA Regulations (set out above), which involves consideration of distance speed, time and manner of walking. Distance was only one factor, therefore. Secondly, when considering distance, I would distinguish the practical situation in Northern Ireland from Great Britain. I decline to endorse any presumption of inconsistency based on a notional 50 metre rule of thumb as the measure of distance in regulation 12(1)(a)(ii) of the DLA Regulations. At the risk of sounding pedantic, the adoption of a rule of thumb in this context is simply wrong.

31. Moreover, I find the reliance on a notional 50 metre rule of thumb in Great Britain to be somewhat undermined by evidence. DLA was abolished earlier in Great Britain than in Northern Ireland, with PIP commencing by way of a phased introduction, I believe, on 27 October 2013. I take judicial notice of published DLA guidance from the DWP that appears in Chapter 61

of DMG Volume 10, dated 31 July 2011. This concerns the distance aspect of the test for the high rate mobility component of DLA and advises DWP decision makers:

61323 In the absence of any significant indications as to the other three factors, manner, speed and time, (DMG 61276 refers), if a claimant is unable to cover more than 25 to 30 metres without suffering severe discomfort, his walking ability is not 'appreciable' or 'significant'; while if the distance is more than 80 or 100 metres, he is unlikely to count as 'virtually unable to walk'.

32. From this, it appears that the guidance to DWP decision makers indicated that it was open to them to make an award of DLA high rate mobility component if the claimant's walking ability was between 30 and 80 metres. This guidance accords with my own understanding of the margin of appreciation that was open to decision makers and tribunals, rather than the 50 metre rule of thumb that is referred to in the Upper Tribunal decisions. This is why at paragraph 34 of *JF v DfC*, I said:

34. From the above discussion, it follows that I do not accept the proposition that, in cases where claimants previously enjoyed an award of DLA high rate mobility component, there is a heightened requirement on tribunals generally to give reasons for not finding that descriptors 1(c)-(f) are satisfied. The conditions of entitlement to PIP mobility component do not neatly equate to the DLA conditions of entitlement. Many claimants who would previously have been awarded DLA at the rate of the high rate mobility component will be excluded from the equivalent PIP rate simply because the conditions of entitlement are different.

33. The latter sentence is also relevant to the issue of perceived injustice. I acknowledge the concerns expressed by Judge Markus that an important aspect of the role of reasons is to avoid perceptions of unfairness or feelings of injustice. I can see why this is important in a context where there is a non-renewal of a benefit award

based on precisely the same conditions of entitlement and – as far as the claimant is concerned – no improvement in functional impairments arising from disability. However, the differences between PIP and DLA are based on government policy. Affected claimants had an opportunity to lend electoral support to that policy or to support alternatives. It does not appear to me that there is any requirement for judicial bodies to engage with perceptions of unfairness or feelings of injustice that arise from political decision making.

34. Mr Black submits that there is an inconsistency between my approach and that of Deputy Commissioner Wikeley in *DC v DfC*. He referred me to paragraphs 14 and 16 of that decision, which read.

“14. The key point to my mind is that the Appellant’s evidence was clear that her mobility had worsened since the date (in September 2009) she had been assessed by the EMP for the purposes of her DLA claim. The fact that she then qualified for the higher rate of the DLA mobility component but did not now meet the test for the standard rate of the PIP mobility component called for more by way of an explanation. The Appeal Tribunal referred to only two findings from the EMP report – about the distance she could walk before the onset of severe discomfort and about the potential assistance a rollator could provide. This rather has the appearance of the EMP report’s findings being ‘cherry-picked’ for factors that supported the tribunal’s decision under the PIP regime.

15. However, the very fact that the EMP found the Appellant could walk “several hundred metres” before the onset of severe discomfort in itself suggested that there must have been other highly significant factors which justified a finding that she was “virtually unable to walk” within the statutory test for HRMC of DLA. Indeed, as the Appellant wrote in her letter seeking leave to appeal, “The question is not how far I can walk but the manner in which I walk”. This is borne out by closer scrutiny of the EMP report. This included the following further

findings (from 2009), several of which the Appellant herself cited in her letter seeking leave to appeal:

- “unable to walk any distance alone, needs to be supervised, often holds on to someone for balance”;
- nil function in right foot and substantial impairment of right ankle and lower leg;
- “very severe restriction in function R foot ... longstanding foot drop ... unable to move 4th/5th toes”;
- “evidence of muscle wasting and [reduced] reflexes R leg”;
- “balance poor when unsupported, tends to sway ++”;
- “the customer reports a severe level of disability which is supported by my clinical findings. This is in keeping with the natural history of polio”;
- “she is at risk of falls without support”;
- “her severe functional restriction is therefore permanent and may deteriorate further in the future”.

16. The Appeal Tribunal made no reference to any of those findings, which in aggregate made sense of the previous decision to award the DLA HRMC, despite the fact that the Appellant was adjudged to be capable of walking several hundred metres before the onset of severe discomfort. Those findings were also consistent with the Appellant’s account that her ability to mobilise had deteriorated over time. In sum, I agree with the Appellant’s representative that the Appeal Tribunal failed to provide an adequate explanation as to why the Appellant qualified for the HRMC of DLA yet did not meet the test for the PIP mobility component. This failure constitutes a failure to provide adequate reasons and a material error of law”.

35. The case of *DC v DfC* involved a claimant experiencing the worsening late effects of childhood polio. The DLA award of high rate mobility component was based upon an EMP report that indicated that the claimant was able to walk “several hundred metres”,

which would appear to be outside the reasonable range within which a claimant might be found to satisfy the test for DLA high rate mobility component. The tribunal referred to this finding on distance when making its decision on PIP. However, on a closer reading, the problem with mobility that the claimant was experiencing was muscle wasting and diminished reflexes in her left leg, along with worsening right foot drop leading to impaired balance and a risk of falls. While the tribunal had made reference to potential use of a rollator, it did not appear to have addressed fully the claimant's mobility difficulties based on all the relevant facts.

36. It appears to me that the Deputy Commissioner in *DC v DfC* was making a decision that was consistent with the line of authorities from *R(M)1/96* onwards. To use the words of Commissioner Howell the tribunal in *DC v DfC* had not made sure "that the reason for an apparent variation in the treatment of similar relevant facts appears from the record of their decision". As indicated above, however, *DC v DfC* was not a decision based on mobility distance, but concerned questions of the DLA high rate mobility component based upon the manner of walking. In view of regulation 4 of the PIP Regulations this gave rise to question about whether walking could be accomplished safely and to a reasonable standard that had not been fully addressed and reasoned. The Deputy Commissioner indeed said "I agree with the claimant's representative that the Appeal Tribunal failed to provide an adequate explanation as to why the Appellant qualified for HMRC of DLA yet did not meet the test for the PIP mobility component". However, this was in the context of the particular case and was not implying a general rule requiring reasons in all cases where DLA had been awarded but not subsequently PIP. The key to finding that the duty to give reasons arises in such cases, in my view, is whether there is some evident inconsistency in the decision making, affording due allowance for the fact that the rules of entitlement are different. At paragraph 80 of *CH and KN -v- SSWP*, Judge Markus noted that it is for the tribunal to judge in the circumstances of the particular case whether there is an apparent inconsistency such that reasons are called for. I agree with her entirely, while rejecting any proposition that inconsistency automatically arises from PIP mobility component being refused to a claimant who previously had an award of DLA high rate mobility component".

19. In the present case, it is evident that the appellant has a congenital heart condition that has needed treatment throughout his life, most recently in April 2017 in the form of major cardiac surgery to replace a pulmonary valve. It would appear that he first qualified for DLA as a 5 year old. The most recent award, which included high rate mobility component, was made at age 16 and appears to have been an indefinite award, only terminated by reason of the Department's replacement of DLA by PIP. However, little evidence of the basis of that award appears to exist. The only material placed before the tribunal was an element of a DLA250 periodic enquiry form dated December 2008, when the appellant was 22, where his GP indicated that he had residual cardiac debility and asthma, being on inhaler therapy. There was no evidence to indicate the precise basis of the previous award to the tribunal. However, it is reasonable to assume that it was based on physical restriction on mobility distance.
20. Nevertheless, for the reasons advanced above, I reject the submission that there is an automatic inconsistency between the refusal of an award of PIP mobility component and the past award of high rate DLA mobility component. The question is whether there is such an obvious inconsistency that reasons are called for to justify it.
21. In this case, the appellant presented evidence to the tribunal from the ACHD (Adult Congenital Heart Disease) clinical nurse specialist that can only be described as highly supportive. This noted that the appellant becomes easily fatigued on minimal exertion, with ability to walk restricted to around 20 yards after which he becomes short of breath, and that he required around the clock help and supervision from his wife and family on a day to day basis. Against that, the tribunal had the evidence of the HCP, who indicated an opinion that the appellant could walk more than 200 metres.
22. The reasoning of the tribunal centred on the apparent inconsistency between the ACHD clinical nurse indicating that the appellant required around the clock help and supervision and his ability to hold down a job as a bus driver. It is plain that the tribunal rejected the evidence of a 20 yard limitation in the ACHD clinical nurse's evidence on the basis of the general credibility of her evidence being undermined by that same inconsistency. The tribunal stated its understanding that the purpose of the surgery in 2017 had been to improve the appellant's quality of life. It took the view that this had been the outcome. It found that he could walk between 50 and 200 metres.
23. The tribunal did not make specific reference to the only entry in the medical records where the appellant described his own walking distance. However, I observe that in December 2016 the appellant reported to a GP in his medical practice that his exercise tolerance on the flat was "only about 50-70 yards". This would reasonably be expected to have improved after the April 2017 surgery, and is consistent with the tribunal's assessment of 50-200 metres. It does not appear to me that the tribunal

has failed to explain its reasons. It did not accept the evidence of the ACHD nurse at one end of the spectrum and it did not accept the evidence of the HCP at the other end of the spectrum. It preferred to find that the actual walking ability was somewhere in between. I consider that this is not an irrational finding in face of the evidence before it as a whole.

24. Mr Black's second ground is that the tribunal has placed too much weight on the applicant's ability to drive. He refers to the decision of Chief Commissioner Mullan in C50/10-11(DLA) which indicated that ability to drive on familiar routes did not necessarily preclude entitlement to low rate DLA mobility component on the basis of a need for guidance or supervision on unfamiliar routes. He further relies on my own decision in *JMcD v Department for Communities* [2019] NI Com 4 where I hold that it is legitimate for a tribunal to consider how the actions involved in driving a car might read across into the scheduled daily living and mobility activities, subject to the qualification that the activity in question is genuinely comparable and that it is done with the same level of regularity as the scheduled activity.
25. This was not a case where the claimant was an occasional driver and where short driving trips to local shops were undertaken when he was feeling up to it. Rather the applicant was employed full time as a bus driver in Belfast, holding a PSV licence. It seems to me that the case of *JMcD* has little relevance on its facts from the point of view of regularity.
26. In submitting that he satisfied daily living activity conditions, the applicant relied upon the evidence of the ACHD nurse to the effect that he required "around the clock help and supervision". However, the fact of his full time employment as a bus driver clearly rendered such evidence unreliable. The tribunal relied on the fact that he was employed as a bus driver when assessing the weight to be given to the ACHD nurse's evidence. It was entitled to do so. I reject this ground.
27. Mr Arthurs for the Department makes a further submission in the interests of the applicant. He refers to paragraph 5 of the statement of reasons. The tribunal states:

"The submission on the Appellant's behalf seeks the award of 2 points in respect of preparing food, 3 points in respect of washing and 2 points in respect of dressing and undressing. If those 7 points were awarded then the Appellant would still not have sufficient points to be entitled to the standard rate care component, the threshold being 8 points..."
28. He notes that the tribunal does not appear to have addressed the daily living activities fully in its statement of reasons on the basis that the applicant could not succeed on this calculation of points. However, Mr Arthurs points out that the applicant's representative had argued in his

written submission for activity 1(e), which in fact leads to an award of 4 points. This would mean that the threshold could have been crossed had the tribunal accepted that the descriptors were satisfied.

29. I note that it is the representative who first attributed 2 points to descriptor 1(e) in his submission and thereby has led the tribunal into error. However, the tribunal needed to be alert to the possibility that the representative's submission included an error and to have addressed the relevant number of points arising from the submission independently. I must agree with Mr Arthurs' analysis that the tribunal has not given sufficient consideration to the daily living activities for that reason.
30. I consider that the tribunal has erred in law. I grant leave to appeal and I allow the appeal. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

8 June 2020