

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 2 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 with reference BY/8611/17/03/D.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal under Article 15(8)(b) of the Social Security (NI) Order 1998. I set aside the decision of the appeal tribunal and I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The appellant was previously awarded disability living allowance (DLA) from 4 March 2013 at the low rate of the mobility component and the low rate of the care component. As his DLA entitlement was due to terminate under the Welfare Reform (NI) Order 2015, he was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). He claimed PIP from 27 July 2017 on the basis of needs arising from congenital nystagmus and optic atrophy, chronic headaches and depression.
4. The appellant was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 1 September 2017, enclosing a consultant ophthalmic surgeon's report. He was asked to attend a consultation with a healthcare professional

(HCP) and a consultation report was received by the Department on 25 September 2017. On 5 October 2017 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 27 July 2017. The appellant requested a reconsideration of the decision. 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. The tribunal disallowed the appeal following a hearing on 2 August 2018. The decision of the tribunal was issued by post to the appellant on 6 August 2018. On 19 September 2018 a representative – attaching a signed authority to act for the appellant dated 15 September 2018 - made a request by e-mail for a statement of reasons for the tribunal’s decision. In circumstances which will be described below, the LQM refused to admit the late application for a statement of reasons.
6. On request, a record of proceedings was issued on 13 March 2019. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal but the application for leave to appeal was rejected by a determination issued on 13 August 2019. By an application sent on 11 September 2019 the appellant applied to a Social Security Commissioner for leave to appeal. The application is irregular, as it does not contain a statement of reasons for the appeal tribunal’s decision. Nevertheless, I waive the irregularity under regulation 27 of the Social Security Commissioners (Procedure) Regulations (NI) 1999 for the reasons I give below.

Grounds

7. The appellant, represented by Mr Callanan of the RNIB, submits that the tribunal has erred in law on the basis that:
 - (i) it has placed weight on immaterial matters by focusing on details of his past employment;
 - (ii) it has made insufficient findings of fact by failing to explore difficulties with mobility activities in any detail.
8. 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. He indicated that the Department did not support the application.
9. Mr Callanan was given an opportunity to respond but had no further submissions to add.

The tribunal's decision

10. The appellant requested a statement of reasons for the tribunal's decision out of time and the LQM declined to extend time in the circumstances as they were known to her. Therefore, there is no available statement of reasons for the tribunal's decision. However, I consider that there are some unsatisfactory aspects to the context of the LQM refusing to extend the time for giving a statement of reasons in this case.
11. Among these, it appears that the Appeals Service characterised the application for a statement of reasons as having been made on 10 November 2018. This date was more than three months from the date of the giving or sending of the notice of the decision of the appeal tribunal. Therefore the LQM would not have had jurisdiction to extend the time limit for providing a statement of reasons under regulation 54(1) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the 1999 Regulations). However, it appeared to me from the tribunal file that this was not the correct date of the application but almost two months later than the actual date of application.
12. I issued a direction to the LQM requesting clarification of her understanding of the facts. However, the President of Appeal Tribunals responded to indicate that the LQM had since retired and that this could not be provided.

Relevant legislation

13. The provisions governing the tribunal's duty to give reasons appear at regulations 53 and 54 of the 1999 Regulations. The basis of the right to a statement of reasons is regulation 53(4), which provides:

53(4) Subject to paragraph (4A), a party to the proceedings may apply in writing to the clerk to the appeal tribunal for a statement of the reasons for the tribunal's decision within one month of the sending or giving of the decision notice to every party to the proceedings or within such longer period as may be allowed in accordance with regulation 54 and following that application the chairman or, in the case of a tribunal which has only one member, that member, shall record a statement of the reasons and a copy of that statement shall be sent or given to every party to the proceedings as soon as may be practicable.

14. Regulation 54 further provides:

54(1) The time for making an application for the statement of the reasons for an appeal tribunal's decision

may be extended where the conditions specified in paragraphs (2) to (8) are satisfied, but, subject to regulation 53(4A), no application shall in any event be made more than three months after the date of the sending or giving of the notice of the decision of the appeal tribunal.

(2) An application for an extension of time under this regulation shall be made in writing and shall be determined by a legally qualified panel member.

(3) An application under this regulation shall contain particulars of the grounds on which the extension of time is sought, including details of any relevant special circumstances for the purposes of paragraph (4).

(4) The application for an extension of time shall not be granted unless the legally qualified panel member is satisfied that it is in the interests of justice for the application to be granted.

(5) For the purposes of paragraph (4), it is not in the interests of justice to grant the application unless the legally qualified panel member is satisfied that—

(a) the special circumstances specified in paragraph (6) are relevant to the application; or

(b) some other special circumstances exist which are wholly exceptional and relevant to the application, and as a result of those special circumstances it was not practicable for the application to be made within the time limit specified in regulation 53(4).

(6) For the purposes of paragraph (5)(a), the special circumstances are that—

(a) the appellant or a partner or dependant of the appellant has died or suffered serious illness;

(b) the appellant is not resident in the United Kingdom; or

(c) normal postal services were disrupted.

(7) In determining whether it is in the interests of justice to grant the application, the legally qualified panel member shall have regard to the principle that the greater the amount of time that has elapsed between the expiry of the time within which the application for a copy of the statement of reasons for an appeal tribunal's decision is to be made and the making of the application for an extension of time, the more compelling should be the special circumstances on which the application is based.

Assessment

15. 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.
16. 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.
17. 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.
18. Without a statement of reasons, I am not able to address the grounds of appeal formally relied on by the applicant. I cannot tell what weight the tribunal placed on his past employment or how it addressed his mobility difficulties. Nevertheless, as Commissioner I have an inquisitorial jurisdiction and an obligation to address clearly arguable matters, even where they are not raised by a party.
19. On 12 December 2018, the LQM exercised her discretion under the 1999 Regulations to refuse an extension of time for applying for a statement of reasons and declined to prepare a statement of reasons. A decision on whether to extend time for the purpose of issuing a statement of reasons is a matter fully within the LQM's discretion. However, from the file before me, I remain uncertain as to whether the LQM had fully appreciated all the facts and circumstances surrounding the application.
20. In particular, from the tribunal file it appears that the application for a statement of reasons for the tribunal's decision was made on 19 September 2018. The pro forma determination submitted to and signed by the LQM characterises the application as having been made on 10 November 2018.

21. The first of those dates was beyond the one month time limit for requesting a statement of reasons under regulation 53(4) of the 1999 Regulations, but remained within the time limit for requesting an extension of time for a late application under regulation 54(1). The second of the dates – that is the one put to the LQM in the pro forma she signed - was beyond the absolute time limit for an extension of time.
22. It appears likely that the LQM, in exercising her discretion, may have been misled by the dating of the application by the Appeals Service as 10 November 2018 and therefore may have been misled as to the extent of her discretion to admit the late application. On that basis I grant leave to appeal as I consider that an arguable error of law arises.
23. I understand the circumstances to have been as follows:
 - (i) the tribunal heard and determined the appellant's appeal on 2 August 2018;
 - (ii) the tribunal disallowed the appeal and a copy of the decision was issued by post to the parties on 6 August 2018;
 - (iii) on 19 September 2018 Mr Callinan of the Royal National Institute for the Blind in London sent an email to the Appeals Service. He attached a signed authority from the appellant. The authority was dated 15 September 2018. By his email, Mr Callinan made a request for a late statement of reasons for the tribunal's decision, incorrectly referencing the Great Britain First-tier Tribunal Regulations, but setting out grounds for admitting the late application which were equally relevant to the 1999 Regulations;
 - (iv) the application was made beyond the statutory time limit of "one month of the sending or giving of the decision notice to every party to the proceedings" under regulation 53(4) of the 1999 Regulations, which at the latest would have expired on 6 September 2018. Therefore the application was some 13 days out of time;
 - (v) the Appeals Service rejected the form of authority signed by the appellant on 7 October 2018, stating that "your request cannot be actioned as the form of authority you have attached is not valid". The application requested the representative to have an official Appeals Service Form of Authority completed by the appellant;

(vi) a signed Appeals Service Form of Authority was duly returned to the Appeals Service by the representative on 10 October 2018;

(vii) on 30 October 2018 the Appeals Service sent a further e-mail to the representative, indicating that the correct form of authority had been received to enable an application to be made on the appellant's behalf. However, it indicated that the application remained invalid as it did not bear the handwritten signature of the representative and that all applications must be signed for them to be valid;

(viii) it would appear that the representative understood the Appeals Service email of 30 October 2018 to be a request for him to sign the official Appeals Service Form of Authority, even though there was no blank space for such a signature. He duly did this and returned it to the Appeals Service on 5 November 2018;

(ix) the next relevant document that appears in the tribunal file is the pro forma determination of the Legally Qualified Member dated 12 December 2018. On it the Appeals Service characterised the application for a statement of reasons as having been made on 10 November 2018.

24. Some aspects of the above facts are problematic.
25. Firstly, the act of requiring a particular Appeals Service Form of Authority before accepting the right of a third party to represent the appellant does not appear to have any statutory basis. The appellant had personally signed a very clear authority for Mr Callinan to represent him "throughout any appeals processes" on 15 September 2018. I see no lawful basis for rejecting the right of Mr Callinan to represent the appellant on the basis of that document. I am unaware of any statutory requirement to use an Appeals Service Form of Authority. Such a form may undoubtedly be useful for the Appeals Service where informal representatives in the shape of a family member or friend become involved. However, it cannot have the effect of displacing a properly drafted and signed authorisation advanced by professional representative in a reputable non-governmental organisation.
26. Secondly, when Mr Callinan patiently provided the Appeals Service with a further form of authority on the official document, he was advised that the application for an extension of time remained invalid as it did not bear the handwritten signature of the representative. However, the requirement for an application to be signed also does not appear to have any statutory basis. In particular, whereas regulation 54(2) of the 1999

Regulations requires an application for an extension of time to be in writing, it does not require an application to be signed. Therefore, the Appeals Service had unlawfully rejected the unsigned application.

27. I have no doubt that the effect of being unnecessarily required to revert to the appellant on two occasions to explain apparent missteps in his conduct of the proceedings was embarrassing for Mr Callinan. It also may have served unjustifiably to undermine the appellant's confidence in him somewhat.
28. Thirdly, after putting the representative through these superfluous and time-consuming stages, the Appeals Service characterised the application of 19 September 2018 to the LQM as having been made on 10 November 2018. As indicated above, the application of 19 September 2018 was some 13 days out of time. However, it was still within the discretion of the LQM to admit it. An application of 10 November 2018, however, was beyond the absolute time limit in regulation 54(1) and the LQM was required by law to reject it. While the LQM refers in her determination to matters relevant to an extension of time under regulation 53(4), which suggests that she understood the application to be within the absolute time limit, it is not clear how she applied the principle in regulation 54(7) regarding the amount of time that had elapsed from the expiry of time for application.
29. In short, from her determination, I cannot tell if the LQM understood all the circumstances accurately. As she is now retired, however, that question cannot be answered and no statement of reasons will be forthcoming.
30. There is a general right arising from the common law duty of fairness for a tribunal to state reasons for its decisions. That right requires the decision maker to provide reasons personally and not some third party on the decision maker's behalf. In the case of social security tribunals, a statutory framework has been established to place a requirement on the LQM to issue statements of reasons. The appellant has sought to rely on the duty to give reasons arising from the 1999 Regulations. The 1999 Regulations require applications to be made within statutory time limits. They further give the LQM a discretion to admit late applications, within set parameters, where the initial time limit is not observed. In the particular case, the appellant has requested reasons under the 1999 Regulations within the terms of regulation 54(1) of the 1999 Regulations.
31. The LQM had an absolute discretion to refuse an out of time application. I consider that I would have no jurisdiction to examine the exercise of that discretion in normal circumstances. However, I am troubled by aspects of the administration of this appeal. Administrative steps have been taken that I consider to be other than in accordance with the relevant law. These have placed requirements on the representative that do not appear to have any basis under the statutory regime. These also appear

to have led the Appeals Service to mischaracterise the date of receipt of a valid application for a statement of reasons from the representative.

32. In this case, however, I am also unable to investigate the understanding of the LQM of the correct date on which the application for an extension of time was received. I cannot fully determine her understanding of the extent of her jurisdiction regarding the tribunal's duty to give reasons in the particular circumstances, or whether she has exercised that discretion in full awareness of the administrative errors that have occurred.
33. In the exceptional circumstances of this case, I consider that I must allow the appeal. I allow the appeal on the basis that there has been procedural unfairness involved in and arising from the decision of the tribunal not to give reasons for its decision.
34. I set aside the decision of the appeal tribunal and I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

2 November 2020