

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 27 February 2020

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I grant leave to appeal and proceed to determine all questions arising thereon as though they arose on appeal.
2. The decision of the appeal tribunal dated 27 February 2020 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.

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 September 2018 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 27 September 2018. Following a request to that effect the decision dated 20 September 2018 was reconsidered on 22 November 2018 but was not changed. An appeal against the decision dated 20 September 2018 was received in the Department on 5 December 2018.
6. The appeal tribunal hearing took place on 27 February 2020. The appellant was present but was not represented. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 20 September 2018.
7. On 15 September 2020 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). It appears that there was then a delay in the administrative processing of the application. On 1 February 2021 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).
8. On 18 February 2021 a further application for leave to appeal was received in the office of the Social Security Commissioners. On 24 February 2021 observations on the application were requested from Decision Making Services ('DMS'). In written observations dated 12 March 2021, Mr Killeen, for DMS, supported the application on one of the grounds identified by the appellant. The written observations were shared with the appellant on 15 March 2021.
9. In 2021 priority had to be given to a large group of cases in the office of the Social Security Commissioners. This has led to a delay in the promulgation of this decision for which apologies are extended to the appellant and Mr Killeen.

Errors of law

10. 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?
11. 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

12. In his written observations on the application for leave to appeal, Mr Killeen made the following submissions:

‘Regarding Daily Living activity 9, the Record of Proceedings notes:

“Mixing with other People- Hate the thought. If in waiting room, if somebody speaks to you would talk back. Most of family live close. What about attending a family wedding? Don’t go to functions because of anxiety and stress. If take a load of Pregablin can get through it. Take extra tablets. Brother would take you.”

In the Reasons for Decision the tribunal found:

“61. Engaging With Other People Face to Face – In his application form the appellant stated that he cannot be around groups of

people as he becomes very anxious. The GP noted in the medical records that the appellant's mood was low because of stress of looking after his mother and social avoidance. He stated that he is a loner and likes his own company.

62. At the Tribunal the appellant stated that he hated the thought of going out but if in waiting room he would respond if someone spoke to him. He enjoyed the company of his family although he did not like attending large family functions, the appellant stated that his brother takes him to all of his appointments but it is clear from the contents of the medical records that he has no problem engaging with medical and nursing staff, especially when talking about his fears around his health.

63. The appellant was also quite clear that he preferred to be alone and had not sought any assistance such as talking therapies to help with overcoming this problem. He appeared to be able to engage with his family without difficulty so the Tribunal was of the opinion that the appellant was exercising a choice to be alone with a consequent impact on his mood, for which he sought no remedy."

In the GB decision *SF v SSWP* [2016] UKUT 0543 (AAC) Judge Bano described what engaging with others entailed:

"6. ... the whole of PIP Activity 9 is concerned with a claimant's ability to engage with other people face to face in social situations. It would follow that in all cases in which Activity 9 is in issue decision makers should apply the definition of 'engage socially' in Schedule 1 and should consider a claimant's ability to interact with others in a contextually and socially appropriate manner, the claimant's ability to understand body language, and the claimant's ability to establish relationships in a social context."

Additionally Judge Ovey in the GB decision; *AB v SSWP* [2017] UKUT 0217 (AAC) stated:

43. It is to be remembered that activity 9 is concerned with engagement of the kind envisaged by the definition of "engage socially" and it is therefore necessary to consider

the ability to engage in a wider range of situations than simply situations involving family, established friends and professionals with clearly defined roles...

In Northern Ireland unreported decision AH v Department for Communities(PIP) [2019] NI Com 20 (C24/18-19(PIP) Chief Commissioner Mullan endorsed the principles in SF v SSWP Judgment and stated at paragraphs 17 and 18:

“17. I would add that the principles in SF v The Secretary of State for Work and Pensions ([2016] UKUT 0543 (AAC)), AB v SSWP ([2017] UKUT 0217 (AAC)) and PM v SSWP ([2017] UKUT 0154 (AAC)) have not been doubted – see the commentary at paragraph 2.41 of Volume 1 of Social Security Legislation 2017/2018. To that I would that in HJ v SSWP [2016] UKUT 0487 (AAC) – CPIP/2523/2016, the Judge of the Upper Tribunal held that the tribunal erred in law by failing to award points under activity 9. At paragraph 18 the Judge stated:

“...There is no indication in the regulations that the term “engage socially” is limited to engagement with people who a claimant knows. Indeed the use of the word “others” in the definition of “engage socially”, which is unqualified, strongly suggests that it is not so limited. Moreover the requirement to be able to establish relationships suggests that the activity is not limited to considering engagement with those known to a claimant. Although it is not itself a statement of law, I am reinforced in this by the PIP Assessment Guide published by the Department of Work and Pensions which states (page 122):

“When considering whether claimants can engage with others, consideration should be given to whether they can engage with people generally, not just those people they know well”.

18. I adopt and accept the “reasoning and analysis of the Upper Tribunal in those cases, which, in my view, properly reflect the law in Northern Ireland.

In comparison with Judge Bano and Judge Ovey’s comments and the views of Chief Commissioner Mullan, the tribunal seem to have a narrow view of what activity 9 entails and as such, have made perverse findings that as (the appellant) could engage face to face with health professionals and his own family he sufficiently satisfied daily living descriptor activity 9a

(Can engage with other people unaided) which would not equate to an award of any points under this activity.

Taking all the above into account it is my submission that the tribunal has clearly erred in law and I would support this ground of (the appellant) appeal.

13. Mr Killeen's analysis of the relevant jurisprudence is wholly accurate. With respect to his application of the legal principles in the instant case, I am of the view that the issue is less categorical than he suggests. I have noted that the appellant's evidence, as summarised in the record of proceedings for the appeal tribunal hearing, was that '... he stated that he hated the thought of going out but if in waiting room he would respond if someone spoke to him.' If the 'waiting room' was in his General Practitioner's surgery then it may or may not be the case that the person speaking to the appellant was someone who was known to him.
14. Further, I have noted that the appeal tribunal, having conceded that the appellant's brother accompanied him to his medical appointments concluded that it was 'clear from the contents of the medical records that he has no problem engaging with medical and nursing staff, especially when talking about his fears around his health.' Once again, there has to be a context to how the appellant engages with others during his medical appointments. Does he, for example, speak freely with medical personnel about his fears for his health because he is familiar and comfortable with them from previous appointments? Is the appellant's brother present while the appellant is engaging with medical personnel to help to put him at his ease? Finally, I have also observed that the appeal tribunal has placed a great deal of emphasis on the appellant's ability to engage with his family.
15. On balance, I am of the view that the issue of engaging with other people face to face could and should have been explored in much more detail and for that reason, have concluded that the decision of the appeal tribunal is in error of law.

Disposal

16. The decision of the appeal tribunal dated 27 February 2020 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.
17. 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 September 2018 where a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 27 September 2018;

- (ii) 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 PIP into account in line with the principles set out in *C20/04-05(DLA)*;
- (iii) 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
- (iv) 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

16 August 2022