

IRO (A CHILD)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

DISABILITY LIVING ALLOWANCE

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 18 March 2022

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 BE/1753/20/37/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 refer the matter to a newly constituted tribunal for determination.

REASONS

Background

3. The applicant is a child aged 5 years at the date of claim. Through his mother (the appointee) he claimed disability living allowance (DLA) from the Department for Communities (the Department) from 24 July 2019 on the basis of needs arising from asthma and possible autism. On 30 August 2019 the Department decided on the basis of all the evidence that the applicant did not satisfy the conditions of entitlement to DLA from and including 24 July 2019. The appointee requested the Department to conduct a reconsideration of the decision, submitting further information. The Department reconsidered, but did not revise, its decision. The appointee 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 by way of a video conference facility on 18 March 2022, the tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision, and this was issued on 10 May 2022. 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 August 2022. On 13 September 2022, the applicant applied to a Social Security Commissioner for leave to appeal.

5. The application was received after the expiry of the relevant statutory time limit. The appointee indicates that she had moved house on 16 August 2022 and only received the refusal of leave to appeal on 6 September 2022. I accept that the appointee did not receive the notice at the appropriate time and has acted promptly once it was received. Therefore, I admit the late application for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

6. The applicant submits that the tribunal has erred in law on the basis that:
 - (i) the tribunal failed to take into account or resolve conflicts of fact or opinion;
 - (ii) the tribunal failed to make adequate findings of fact or give adequate reasons, and the hearing was too short;
 - (iii) the statement of reasons did not adequately indicate what documents the tribunal had considered.
7. The Department was invited to make observations on the applicant's grounds. Mr Morrison of Decision Making Services (DMS) responded on behalf of the Department. Mr Morrison accepted that the tribunal decision was erroneous in law and indicated that the Department supported the application.

The tribunal's decision

8. 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 what it termed the "Appeal case papers." From this, and references in the record of proceedings to the applicant's claim form, I assume that the documents before the tribunal included the Department's appeal submission, containing the claim form. In its reasons for decision, the tribunal further refers to a Special Educational Needs Individual Education Plan (SENIEP), dated September 2021 which, I understand, was handed to the tribunal on the day of hearing.
9. The tribunal heard evidence about the applicant's mobility and care needs. In relation to mobility, it found that he was not unable or virtually unable to walk. It found that he had no diagnosis of autism and, whereas it was

stated that he can become anxious, confused, and display unpredictable behaviour requiring physical restraint, the tribunal did not accept that this generated a need for guidance or supervision that was substantially in excess of the needs of a healthy child of the same age. In relation to care, it noted that there was no diagnosis of autism and that the SENIEP post-dated the decision under appeal. It noted that the appointee confirmed that he had constant meltdowns, severe anxiety, poor sleep, poor concentration and that the applicant did not wash or dress himself. It indicated that on balance the tribunal did not accept, on the basis of the documents and evidence provided, that the applicant was entitled to care component.

Relevant legislation

10. The legislative basis of the care component is found at section 72 of the Social Security Contributions and Benefits Act (NI) 1992. This provides:

72.—(1) Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which—

(a) he is so severely disabled physically or mentally that—

(i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or

(ii) he cannot prepare a cooked main meal for himself if he has the ingredients;

(b) he is so severely disabled physically or mentally that, by day, he requires from another person—

(i) frequent attention throughout the day in connection with his bodily functions; or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(c) he is so severely disabled physically or mentally that, at night, —

(i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or

(ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him.

(1A) In its application to a person in relation to so much of a period as falls before the day on which he reaches the age of 16, subsection (1) above has effect subject to the following modifications—

(a) the condition mentioned in subsection (1)(a)(ii) above shall not apply, and

(b) none of the other conditions mentioned in subsection (1) above shall be taken to be satisfied unless—

(i) he has requirements of a description mentioned in the condition substantially in excess of the normal requirements of persons of his age, or

(ii) he has substantial requirements of such a description which younger persons in normal physical and mental health may also have but which persons of his age and in normal physical and mental health would not have.

...

11. The legislative basis of the mobility component is section 73 of the same Act. This provides:

73.—(1) Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the relevant age and throughout which—

(a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so;

(ab) he falls within subsection (2) below;

(b) he does not fall within that subsection but does fall within subsection (2) below;

(c) he falls within subsection (3) below; or

(d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time.

...

(4A) In its application to a person in relation to so much of a period as falls before the day on which he reaches the age of 16, subsection (1) above has effect subject to the modification that the condition mentioned in paragraph (d) of that subsection shall not be taken to be satisfied unless—

(a) he requires substantially more guidance or supervision from another person than persons of his age in normal physical and mental health would require; or

(b) persons of his age in normal physical and mental health would not require such guidance or supervision.

Assessment

12. 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.
13. 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.
14. 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.
15. The appointee challenges the tribunal's decision on three grounds. However, I consider that there is overlap between the grounds to some extent. The first ground submits that the tribunal did not address the issue of how it viewed the appointee's evidence, but simply recites the evidence and indicates that it was not satisfied that the conditions of entitlement were met. The second ground submits that the tribunal did not explain its decision adequately, and failed to investigate the applicant's needs fully, submitting that the hearing was too short. The third ground submits that the tribunal did not make clear that it had considered all the evidence provided, including medical reports, referring only to "appeal case papers" as documents that it had considered.
16. Mr Morrison for the Department accepts that there is merit in the grounds submitted. He notes that the tribunal appeared to have been influenced by the lack of a diagnosis of autism, observing that the lack of a diagnosis alone would not have precluded entitlement to DLA. He submitted that there was an onus of the tribunal to fully consider the applicant's behavioural issues and that these had not been fully explored. He agreed that the tribunal had failed to deal with all the issues raised on the appeal and to investigate the extent of the applicant's needs. He further accepted that the statement of reasons was inadequate to record all the evidence given and relied upon in reaching its conclusions. In the light of the Department's support for the application, I grant leave to appeal.

17. I consider that there is merit in the grounds advanced by the appointee and in the submissions of Mr Morrison. The tribunal appeared to place weight on the lack of a diagnosis of autism but, as made clear by the Tribunal of Great Britain Commissioners in R3/06(DLA) at paragraphs 35 and 36, disability cannot be equated with medical condition. In relation to care needs, the appointee gave evidence regarding the extent of the applicant's disability, but the tribunal did not specifically engage with that evidence, either accepting or rejecting it. It based its decision on the basis of "the evidence and documents provided", without indicating what that evidence was. Whereas it disallowed the low rate mobility component on the basis of the excess needs test in section 73(4A) above, it did not clearly state an evidential basis for disallowing the care component.
18. I consider that the tribunal has not demonstrated that it has reached a decision in accordance with the evidence and explained that decision clearly to the parties, or for that matter to an independent third party such as myself. It is never enough to simply state that on the basis of the evidence the tribunal is satisfied that the appellant is not entitled to a benefit, when the tribunal's findings arising from that evidence have not been recorded. In this case, at the very least, the tribunal should have addressed whether it accepted or rejected the appointee's evidence and on what basis.
19. I allow the appeal and I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

11 January 2023