

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 2 February 2021

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 2 February 2021 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.
2. For further reasons set out below, 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 her 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 6 November 2019 a decision maker of the Department decided that the appellant was not entitled to either component of PIP from and including 9 September 2019. Following a request to that effect, the decision dated 6 November 2019 was reconsidered on 19 November 2019 but was not changed. An appeal against the decision dated 6 November 2019 was received in the Department on 2 December 2019.
6. The appeal tribunal hearing took place on 2 February 2021. The appeal proceeded by way of a 'paper' hearing. I will return below to the listing of the hearing in that mode. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 6 November 2019.
7. On 10 March 2021 an application for leave to appeal to the Social Security Commissioners was received in the Appeals service (TAS). On 9 April 2021 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioners

8. On 4 May 2021 a further application for leave to appeal was received in the office of the Social Security Commissioners. On 12 May 2021 observations on the application were requested from Decision making services (DMS). In written observations dated 7 June 2021, Ms Patterson supported the application on grounds identified by her. The written observations were shared with the appellant on 8 June 2021. On 21 June 2021 further correspondence was received from the appellant which was shared with the Department on 5 July 2021. A further reply was received from Ms Patterson on 20 July 2021 which was shared with the appellant on 22 July 2021.
9. On 18 August 2021 I granted leave to appeal. When granting leave to appeal I gave as a reason that it was arguable that the appeal tribunal has failed to apply the principles in *DJS v Department for Communities (PIP)* [2021] NICom 22. On the same date I directed that an oral hearing of the appeal would not be required.
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?

Errors 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 her written observations on the application for leave to appeal, Ms Patterson set out the following:

‘I note that the appeal hearing took place as a paper hearing. I also note the Record of Proceedings includes:

‘1. DOCUMENTS CONSIDERED:

A. Departmental submissions.

B. Letters from the Appellant – including 04/06/2020, 10/06/2020 (with 1 page GP printout), 12/06/2020 and 17/09/2020.

The Panel decided to proceed on the basis of the available evidence, the Appellant having opted for a Paper hearing in April 2020.’

The letter from April 2020 indicates that (the appellant) was content to proceed with a paper based appeal hearing. However, there is a further letter dated 14/5/20, in which she indicates that although she had previously opted for a paper hearing, she wished for an alternative format to her hearing. The letter dated 4/6/20 states that as of 4/6/20, (the appellant) chose the option of an oral hearing for her appeal and had appointed KW of Citizens Advice Bureau in Enniskillen as her representative. She reiterates the same in the letter dated 10/6/20. I would note that I don't appear to have a letter dated 17/09/2020 in the papers I hold.

Given the content of the letters held, I would contend that perhaps the tribunal should have adjourned the hearing in order to afford (the appellant) and her representative opportunity to attend. Although a tribunal's decision to adjourn is at its own discretion, there are points to consider in relation to this. I would point to Commissioner Stockman's recent decision, *DJS v Department for Communities (PIP)* [2021] NCom 22, wherein he set aside the decision of the first tribunal for failure to adjourn an appeal hearing. In 'DJS' Commissioner Stockman discusses the application of regulation 49(4) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999, which holds:

'(4) If a party to whom notice has been given under paragraph (2) fails to appear at the hearing, the chairman or, in the case of a tribunal which has only one member, that member, may, having regard to all the circumstances including any explanation offered for the absence, proceed with the hearing notwithstanding his absence, or give such directions with a view to the determination of the appeal as he may think proper'.

At paragraph 17 of his decision, Commissioner Stockman states:

'In the exercise of supervisory jurisdiction over the decision of a tribunal that has involved the exercise of judicial discretion, it seems to me that the Commissioner must decide whether the LQM or tribunal:

(i) made a mistake in law or disregarded principle;

- (ii) misunderstood the facts;*
- (iii) took into account irrelevant matters or disregarded relevant matters;*
- (iv) reached a decision that was outside the bounds of reasonable decision making;*
- (v) gave rise to injustice.'*

I have been unable to find within the papers a letter dated 17/09/2020 (see the list of documents considered, above) However, the tribunal has not placed any particular weight on it in its decision to continue with the hearing, but has relied on the letter from April 2020, in which (the appellant) opted for a paper hearing. It continued with the hearing despite her subsequent letters explaining that she did wish to attend. (The appellant) initially felt it would be too difficult to attend in person, but subsequently appointed a representative. I would contend that in light of (the appellant's) stated desire to attend the hearing and the steps she had taken to appoint a representative, the tribunal should have adjourned the hearing in the interest of justice, and that failure to do so could amount to an error in law due to procedural unfairness.'

13. The letter of 17 September 2020 has now been made available, having been supplied by the appellant in her response to Ms Patterson's written observations. It confirms that, as Ms Patterson has further observed, 'the appellant continues to indicate that she wishes to be represented for her appeal hearing.'
14. I agree with all of Ms Patterson's observations and for the reasons which she has set out also agree that the appeal tribunal has committed or permitted a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings.

Disposal

15. The decision of the appeal tribunal dated 2 February 2021 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.
16. 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 6 November 2019, which decided that the applicant was not entitled to PIP from and including 9 September 2019;
- (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

15 February 2023