

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 28 November 2023

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 NS/13057/22/02/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 and I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The applicant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 21 March 2022 on the basis of needs arising from autism spectrum disorder, fibromyalgia, chronic fatigue syndrome/myalgic encephalomyelitis, carpal tunnel syndrome, irritable bowel syndrome (IBS), gastro-oesophageal reflux disease (GERD), Barrett's oesophagus, anxiety, tinnitus and Raynaud's syndrome. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 12 May 2022. The applicant was asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 7 July 2022. On 27 July 2022 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 21 March 2022. The applicant requested a reconsideration of the decision, submitting further evidence. The

Department obtained supplementary medical advice. The applicant was notified that the decision had been reconsidered by the Department and revised, but insufficiently to lead to an award of PIP. She appealed, but waived the right to attend an oral hearing of the appeal.

4. The appeal was considered at a hearing on 28 November 2023 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 6 February 2024. 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 19 March 2024. On 9 April 2024 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The applicant, represented by Community Advice Ards and North Down, submits that the tribunal has erred in law by:
 - (i) Failing to give adequate reasons for its decision.
 - (ii) Misunderstanding the legislation.
 - (iii) Failing to resolve conflicts of fact and opinion.
 - (iv) Making a contradictory and perverse decision.
6. The Department was invited to make observations on the applicant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen accepted that the tribunal had materially erred in law. He indicated that the Department supported the application.

The tribunal's decision

7. 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 applicant and a report of a telephone consultation with the HCP. In the papers there was also a medical report for universal credit (UC) purposes, a general practitioner letter and extracts from the applicant's medical records, a supplementary medical report and the various decisions in the case. The tribunal also had a written submission prepared on behalf of the applicant by Community Advice Ards and North Down. The applicant attended the hearing, represented by Ms Watson, and gave oral evidence. The Department was not represented.
8. The tribunal noted that the applicant had a number of medical conditions including autism, chronic fatigue, carpal tunnel syndrome, irritable bowel

syndrome, Reynaud's disease, Barrett's oesophagus, tinnitus and anxiety. The tribunal focused on the restrictions caused by these conditions at the date of the decision under appeal. While observing that the applicant complained of fatigue, the tribunal stated that it could not identify a physical restriction which would significantly compromise the activities at issue based on the entirety of the evidence. It observed overlap between fatigue and low mood, but found that the applicant functioned adequately physically and mentally. It awarded no points for scoring descriptors and disallowed the appeal.

Relevant legislation

9. 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.
10. 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.
11. Additionally, by regulation 4, certain other parameters for the assessment of daily living and mobility activities, as follows:

4.—(1) For the purposes of Article 82(2) and Article 83 or, as the case may be, 84 whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment taking account of relevant medical evidence.

(2) C's ability to carry out an activity is to be assessed—

(a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or

(b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.

(3) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—

(a) safely;

- (b) to an acceptable standard;
- (c) repeatedly; and
- (d) within a reasonable time period.

(4) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(5) In this regulation—

“reasonable time period” means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person’s ability to carry out the activity in question would normally take to complete that activity;

“repeatedly” means as often as the activity being assessed is reasonably required to be completed; and

“safely” means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity.

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. Expanding on the grounds advanced by the applicant, it was submitted that the tribunal’s reasons were inadequate because it did not address the daily living and mobility components separately and failed to explain its decision in sufficient detail. It was submitted that it had misunderstood the legislation and had overlooked relevant case law, such as *SC v Secretary of State for Work and Pensions* [2017] UKUT 317, with particular reference to lack of motivation and poor concentration, as opposed to physical restrictions, in the activity of preparing a main cooked meal. It was submitted that the tribunal had failed to deal with conflict between the PIP assessment of the HCP and the evidence in the HCP medical report for

UC purposes, with particular reference to mobilising. It was submitted that the tribunal's finding that the applicant adequately functioned physically and mentally was contradicted by the applicant's inability to function at home or in the workplace and maintain social relationships, and was therefore perverse.

16. As indicated above, Mr Killeen on behalf of the Department offered a measure of support to the applicant's grounds. The basis for his support lies in a different issue. This relates to the brevity of the record of proceedings in the case. The entire record of proceedings reads as follows:

"The appellant: I am exhausted all the time. I shop a lot on Amazon as I don't go out. My irritable bowel syndrome flares up, especially if I am stressed. Lot of the job was short time. I am never out".

17. A note of the hearing produced by the applicant's representative provides a somewhat fuller account of what transpired. I will not set this out, but observe that it indicates that focused evidence was given relevant to five daily living activities, namely Preparing food, Washing and Bathing, Managing toilet needs, Dressing and undressing and Making budgeting decisions.

18. I consider that Mr Killeen's observations amount to a helpful summary of the law and are worth setting out. He stated:

23. "The legislation governing the Record of Proceedings is provided by Regulation 55 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999:

"Record of tribunal proceedings

55.—(1) A record of the proceedings at an oral hearing, which is sufficient to indicate the evidence taken, shall be made by the chairman or, in the case of an appeal tribunal which has only one member, by that member, in such medium as he may determine."

24. Regulation 55 and the adequacy of the record of proceedings has been thoroughly discussed in case law. For example, in the unreported NI decision C48/99-00(DLA) the then Chief Commissioner Martin commented:

"16. ...it is obvious that the Chairman's record of proceedings is not a complete record of all that went on at the hearing. However there is no obligation to make a verbatim record of all that does occur at a Tribunal hearing although the record should summarize all relevant evidence and also note any written evidence and

submissions that are received by the Tribunal during the hearing. It is difficult for a Commissioner, who has only jurisdiction to decide appeals on points of law, to rule on whether something occurred or did not occur at a Tribunal hearing. ...I do not consider it necessary or constructive to pursue this issue any further save to emphasize that a Tribunal has an obligation to summarize all relevant evidence and also to note that any particular written evidence or submissions were received by the Tribunal during the hearing.”

25. Furthermore in the unreported NI decision C25/02-03(IB) Deputy Commissioner Powell commented:

“11. Before I come to consider these grounds it is appropriate to refer to a matter on which I would, in any event, have allowed the appeal. The chairman’s record of the proceedings is an important document. The regulations require the chairman to keep a record which is sufficient to indicate the evidence taken. The record is intended to be a contemporaneous record of what happened at the hearing and of the evidence that was given. Failure to keep a proper, contemporaneous, record may amount to an error of law. It has often been said that while a failure to comply with the duty to keep a record will not always render a tribunal’s decision erroneous in law, it will do so if, in a particular case, it is necessary to look at the evidence that was given at the hearing in order to decide whether a particular ground of appeal is made out... The record kept here was not in accordance with the requirements of the regulations. This is an appeal where it was important to know what was said at the hearing. That being so, the record of the proceedings is not only defective but the defects amount to an error of law.”

26. I contend that the Record of Proceedings has not adequately recorded what was discussed at the hearing, in turn it is not possible to determine whether the Tribunal fulfilled its inquisitorial role in querying [the applicant]’s functional restrictions due to fatigue. This, in conjunction with the absence of reasons for any PIP activity, is in my view an arguable error of law”.

19. I consider that the criticism of the record of proceedings advanced by Mr Killeen is apt in the present case. In light of the extreme brevity of the record, it appears at first sight entirely arguable that it is not sufficient to indicate the evidence given. This view is supported by a somewhat fuller record of the proceedings prepared by the applicant’s representative that has been advanced with the submissions in the case. The representative’s record indicates that the hearing was rather more complete than the LQM’s record would indicate. In particular, I accept from the representative’s

record of the proceedings that the evidence given at the hearing addressed at least five specific daily living activities.

20. The applicant has challenged the adequacy of the tribunal's reasons. These are normally understood from the statement of reasons, but it can also be important to read the record of proceedings and the statement of reasons together to fully understand them. It would appear that that the applicant had given evidence on matters that were not then addressed by the tribunal in the statement of reasons. These included evidence on aspects such as whether she required to use pads due to IBS, would need to use a stool to wash, or needed to sit in order to dress. It does not appear to me that the tribunal has prepared a record of the proceedings that is sufficient to indicate the evidence given. In the absence of such a record, it appears to me that the tribunal's reasons for its decision are also inadequate.
21. I accept the applicant's submission and the submissions of Mr Killeen. I grant leave to appeal. 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

23 October 2024