

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 6 December 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 ST/2135/23/02/D.
2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

3. The appellant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 11 October 2022 on the basis of needs arising from atrial fibrillation, dizziness, shortness of breath, palpitations, fatigue, exhaustion upon exertion, depression and anxiety. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 4 November 2022 along with further evidence. The Department obtained a factual report from his general practitioner (GP) on 20 March 2023, but this was blank. The appellant was asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 1 May 2023. On 11 May 2023 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 11 October 2022. The appellant requested a reconsideration of the decision, submitting further evidence. He was notified that the decision had been reconsidered by the Department but not revised. He appealed.

4. The appeal was considered at a hearing on 6 December 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 appellant then requested a statement of reasons for the tribunal's decision and this was issued on 30 April 2024. The appellant 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 4 June 2024. On 24 June 2024 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The appellant, represented by Ms Fulton of Advice North West, submits that the tribunal has erred in law by failing to give adequate reasons for its decision.
6. The Department was invited to make observations on the appellant's grounds. Mr Clements of Decision Making Services (DMS) responded on behalf of the Department. Mr Clements submitted that the tribunal had erred in law, but not materially in the sense that the error would not affect the outcome of the appeal. He indicated for that reason that the Department did not support 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 appellant, the appellant's medical records, the audited report of a telephone consultation with a HCP, a new claim decision, a letter from an MLA and a supplementary advice note. The appellant had indicated that he would not be attending the hearing and the tribunal proceeded in his absence but the tribunal also had a submission prepared by a representative on his behalf indicating the activities in dispute – namely daily living activities 1, 3, 4, 5, 6 and 9 and mobility activities 1 and 2. The Department was not represented.
8. The tribunal considered the documentary evidence. It accepted that the appellant should be awarded points for the daily living activities of Managing therapy (3.b.i), Washing/bathing (4.b) and Dressing/undressing (6.b), awarding 5 points. It did not accept that he should be awarded points for Preparing food, Managing toilet needs, or Engaging with others. It accepted that he should be awarded points for the mobility activity of Moving around (2.b) but not Planning and following journeys. It explained that it did not consider (as had been submitted) that the appellant required prompting to prepare a simple meal, that he needed to use an aid to get on and off a toilet or that he needed help to engage with others, noting in particular his attendance at a course of therapy. It further found no evidence to suggest that the appellant required prompting to undertake a journey, noting his attendance at medical appointments and finding that he could take a taxi to unfamiliar places.

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 appellants 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 ground relied on by the appellant is that the tribunal failed to give adequate reasons for its decision (in relation to daily living activity 9, “Engaging with others”). The basic test for adequacy of reasons is whether the appellant upon reading the decision can understand why the tribunal has made the decision that it has. In this case the appellant’s representative has highlighted the passage of the statement of reasons where the tribunal said:

“In summary whilst there were concerns initially that the claimant would not be able to engage, he was able to engage and was able to complete the course. In addition to this claimant also appears to have engaged with a number of different medical professionals with regards to his ongoing care ... while mood may be flat from time to time the tribunal find for the majority of the time he is able to engage with others without prompting”.

16. It seems to me to be evident that the tribunal has judged that the appellant was able to engage with others on the basis that he completed a course (of counselling) and engaged with medical professionals. Those are the reasons why it did not award points for activity 9. Whether they are adequate reasons does not depend on whether they are “good” reasons as a matter of law, but whether they adequately convey the reasoning of the tribunal. It appears to me that they do convey the tribunal’s reasoning and that anyone reading them can understand the basis for the tribunal’s decision. Therefore, the tribunal’s reasons

are adequate and there is no merit in the appellant's submission that it has not given adequate reasons.

17. However, as stated in other decisions, the Commissioner has an inquisitorial jurisdiction and this can give rise to an obligation to address matters which have not been raised by a party but are plainly arguable. Whereas the appellant's representative has characterised this case as a challenge to the adequacy of the tribunal's reasons, it seems to me that what she really intended was to submit that the tribunal had failed to apply the correct test for daily living activity 9.

18. The legislation setting out activity 9 in Schedule 1 of the PIP Regulations provides four descriptors, as follows, with relevant scores:

9. Engaging with other people face to face.

a. Can engage with other people unaided. 0

b. Needs prompting to be able to engage with other people. 2

c. Needs social support to be able to engage with other people. 4

d. Cannot engage with other people due to such engagement causing either –

(i) overwhelming psychological distress to the claimant, or

(ii) the claimant to exhibit behaviour which would result in substantial risk of harm to the claimant or another person. 8

19. The appellant's representative has submitted that the test for the purpose of activity 9 requires a tribunal to look at how the claimant engages generally, not just with medical staff. Reliance was placed on the Great Britain Upper Tribunal decision in *HA v Secretary of State for Work and Pensions* [2018] UKUT 56.

20. Mr Clements for the Department acknowledges that the test in activity 9 is not satisfied if a claimant is only able to engage with a limited range of people, accepting that this was established in *HA v SSWP*. However, he observes that the appellant did not submit at any point that, whereas he could engage with medical professionals, he could not engage with other people.

21. Nevertheless, he observes that, in the present case, the particular context of the course of the counselling that the appellant experienced was one of weekly sessions by telephone. He points out that this was not "face to face" engagement as required by the activity heading. Therefore he accepts that the tribunal erred by relying on this course as evidence of the appellant's ability to engage face to face.

22. Mr Clements further submits, however, that the error of law is not a material one. He points out that the descriptor relied upon by the appellant's representative was 9.b. This would lead to an award of 2 points if satisfied. As the tribunal had awarded 5 points, this would take the appellant's score at best to 7, which was still too low to satisfy the test of entitlement to the daily living component. This meant that, while the tribunal may have erred in law, it had not materially erred in law in the sense that the error of law would make no difference to the outcome of the appeal.
23. It appears to me that the tribunal has erred in law by taking into account a course of counselling that was completed over the telephone, rather than face to face. More generally, I accept that it relied unduly on the evidence of engagement with medical professionals, contrary to case law including *AH v SSWP*, as submitted by the applicant. On this basis, I consider that the tribunal has arguably erred in law and I grant leave to appeal.
24. However, there is also force in Mr Clements' observation that the height of the appellant's case was that he should be awarded 2 points for descriptor 9.b. This is not enough to lead to an award of daily living component. It appears to me that any error of law was not a material error in the sense that it was capable of affecting the outcome of the appeal. Therefore, I disallow the appeal.

(Signed): O STOCKMAN

COMMISSIONER

28 October 2024