

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 24 November 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 NS/11110/22/02/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 . I refer the appeal to a newly constituted tribunal for determination.

REASONS

3. This case has involved a number of administrative errors - arising from documents being overlooked and failures of communication - which are likely to have caused great frustration to the appellant. One such error occurred in the proceedings before me, leading to delay in giving a decision, and I apologise to the appellant for that. More significantly, a submission made in good faith by the Department in these proceedings questioned the legal basis of the appellant's existing award. This caused the Commissioners' office to issue a notice about the possible consequences of proceeding with the case that was doubtless alarming to the appellant and his representative. Again, I must apologise if that notice caused unnecessary distress.

Background

4. The appellant had previously been awarded personal independence payment (PIP) from the Department for Communities (the Department) from 9 August 2017 to 21 June 2021 at the standard rate of the daily living

component and the enhanced rate of the mobility component. On 22 April 2021 the Department asked him to complete an AR1 review form. He completed this indicating that he had needs arising from chronic obstructive pulmonary disease (COPD), cardiovascular accidents (CVAs), possible haemoptysis, alcohol dependence syndrome, cirrhosis of the liver, B12 deficiency, chest infection, drug overdose, epigastric hernia, multiple pneumonia, multiple rib fractures, high risk factors re Covid 19, hiatus hernia, gastritis, fatigue; and post-traumatic stress syndrome (PTSD). He returned it on 8 June 2021 along with further evidence. Due to restrictions in place at the time arising from the Covid 19 pandemic, the Department extended the appellant's award to 21 March 2022 without further evidence.

5. The appellant was subsequently asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 24 January 2022. On 22 March 2022 the Department superseded the existing PIP award and decided that the appellant satisfied the conditions of entitlement to the standard rate of the daily living component from 22 March 2022 to 23 January 2027, but did not satisfy the conditions of entitlement to the mobility component from and including 22 March 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.
6. The appeal was considered at a hearing on 24 November 2022 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal, maintaining the level of the award from the Department. The appellant then requested a statement of reasons for the tribunal's decision, and this was issued on 7 February 2023. 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 26 April 2023. On 24 May 2023 the appellant applied to a Social Security Commissioner for leave to appeal but sending his application to the Appeals Service in error.
7. The application was received by the Office of the Social Security Commissioners after the expiry of the relevant statutory time limit. However, on 10 August 2023 the Chief Commissioner notified the appellant that he had admitted the late application for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

8. The appellant, now represented by Mr Easton MLA, submitted that he suffers from a number of physical conditions. He did not expressly set out submissions to the effect that the tribunal had erred in law.

9. 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 not materially erred in law on basis of any of the grounds advanced. He indicated that the Department did not support the application on those grounds.
10. However, he submitted that an error of law arose from the actions of the Department. Observing that the appellant's then current award ended on 21 March 2022, and that the Department purported to supersede the award on 22 March 2022 after it had expired, he submitted that the supersession was not valid and of no legal effect. Whereas this had the implication that the appellant had no entitlement after 21 March 2022, he indicated that the Department would not seek to recover any overpaid benefit and encouraged the appellant to make a fresh claim.

The tribunal's decision

11. 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 AR1 questionnaire completed by the appellant, medical evidence, an ESA85A report (relating to employment and support allowance), a report of a telephone consultation with the HCP, decision notices and the appellant's medical records. The appellant attended the hearing along with his wife and daughter and gave oral evidence. The Department was not represented.
12. The tribunal accepted that the appellant suffered from medical conditions including chronic obstructive pulmonary disease (COPD), alcoholism, post-traumatic stress disorder (PTSD) and B12 deficiency. It found that there was variability in the functional effect of these conditions. It also found that there were exaggerations in the appellant's evidence. In relation to daily living, despite its findings on exaggeration, the tribunal accepted that the appellant should be awarded points for the activities of preparing food (1(d)), managing a health condition (3(b)(i)), washing and bathing (4(c)), dressing and undressing (6(c)(i)), engaging with other people (9(b)) and making budgeting decisions (10(b)). It did not accept that there were problems with taking nutrition, managing toilet needs, communicating verbally or reading and understanding.
13. In relation to mobility, the tribunal found that the appellant drove a car regularly in his local area and would have been capable of daily driving. It found no physical or mental reason why he could not plan and follow a journey in a car or on foot. It accepted that he had some mental health issues, but not that they would restrict him in travelling. It found that the appellant had exaggerated his evidence regarding physical mobility restrictions. It noted that during the period when he had been awarded enhanced mobility he had fallen when walking on a beach. It found references to him walking normally in the medical records and observed

that he had told medical staff that he used a walking stick only occasionally. It found that he had used a rollator at the hearing to attempt to influence the tribunal. It disallowed mobility component.

Relevant legislation

14. 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.
15. 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.
16. 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.

Submissions and assessment

17. I directed an oral hearing of the application. The appellant attended the hearing, accompanied by his wife and represented by Mr Easton MLA. The Department was represented by Mr Clements of DMS. I am grateful to the representatives for their assistance.
18. Although it was a claimant’s application, I invited Mr Clements to open the legal argument, as his submission was to the effect that the appellant had no valid decision awarding PIP and that the present proceedings were effectively null and void. Mr Clements then made the submission – as he had in written submissions - that the decision of 22 March 2022 was *ultra vires* and of no legal effect.
19. The basis of this submission was that the decision notified to the appellant on 2 October 2020, which extended his PIP award to 21 March 2022, had expired on 21 March 2022. There was no fresh claim from the appellant in the meantime. When an officer of the Department purported to supersede an existing award on 22 March 2022, there was no award of PIP then in place. It was not possible to supersede a non-existent decision and the purported decision was a nullity. This would have the implication that there was no valid decision or appeal before the tribunal.
20. 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.
21. 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.

22. 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.
23. As it appeared to me that Mr Clements raised an arguable case of error of law, albeit not in the claimant's interests, I decided to grant leave to appeal.
24. In the course of the hearing, I gave some oral directions to Mr Clements to provide me with further evidence and information. He responded within days of the hearing date. His efficient response was regrettably overlooked in the Commissioners' office at the time. This factor has led to considerable delay in reaching a decision in his case.
25. I had anticipated that, when I received a response from Mr Clements, I would return to Mr Easton for further written submissions. However, in light of the content of the response from Mr Clements, and the delay which has already occurred, I do not now consider that course of action to be desirable or necessary.
26. Mr Clements has responded with some new factual information that alters the basis of his legal submissions in the case. In short, whereas the Department's submission to the tribunal had referred to a decision of 2 October 2020 to extend the appellant's PIP award to 21 March 2022, and to a purported supersession decision dated 22 March 2022 which is the subject of these proceedings, Mr Clements has uncovered another Departmental decision dated 22 February 2022.
27. That decision had awarded the appellant PIP at the enhanced rate of the mobility component and the standard rate of the daily living component to 21 June 2022. However, no notice of this decision had been sent to the appellant. Further, the tribunal was not informed of the decision. As he in turn was entirely unaware of it, Mr Clements's submissions to me were based on a factually inaccurate premise. Mr Clements has provided a screenshot from the Departmental computer system recording the decision of 22 February, and I accept that such a decision was made.
28. Mr Clements had submitted to me that no valid supersession decision could be made in the appellant's case after 21 March 2022, as the appellant had no existing entitlement to PIP after that date. However, the supersession decision of 22 February 2022 had extended the period of award to June 2022, meaning that an award was in place on 22 March 2022, and that a supersession on that date would have been legally valid. Therefore, he withdraws his earlier submissions.
29. However, Mr Clements points out that the tribunal decision would still have been erroneous in law and irrational on the evidence in light of his previous submissions. This is because there was no evidence of a legally valid decision before the tribunal. I accept that his submission on this point has

weight, albeit that I would have some sympathy with the tribunal for failing to pick up on the issue.

30. It troubles me that a Departmental decision was made on 22 February 2022 that the appellant was not notified of. However, I understand that the Department was working within difficult circumstances in a post-Covid context. Nevertheless, the consequence of this was that the tribunal was also not made aware of the decision. On the evidence before it, the tribunal's decision was erroneous in law. However, it is arguable that the error, in light of the decision of 22 February 2022, was immaterial, as the tribunal would probably have reached the same outcome.
31. Nevertheless, it seems to me that an element of unfairness is involved in the proceedings before the tribunal. A key document relating to the proceedings – namely the award decision of 22 February 2022 – was not brought to its attention. This has resulted from a standard of public administration that has fallen below the level that should be expected. That shortfall has negatively affected both the tribunal proceedings and the proceeding before me.
32. Absence of such a key document constitutes grounds for setting aside. I consider that it taints the fairness of the proceedings in the sense that the appellant is entitled for his case to be decided by a tribunal in possession of all the facts. In all the circumstances of this case, and noting the administrative errors that have arisen, I consider that it is appropriate to allow the appeal and to set aside the tribunal decision on the basis that its proceedings were unfair.
33. Whereas Mr Easton has provided me with evidence relating to the state of the appellant's health, I consider that any medical evidence is best considered by a tribunal including a medical member. Therefore, I refer the appeal to a newly constituted tribunal for determination.
34. The appeal lies against the decision of 22 March 2022. However, the new tribunal shall have regard to the decision of 22 February 2022 and shall determine whether there were grounds to supersede that decision on 22 March 2022. The appellant has made a fresh claim on 23 July 2023, on the misunderstanding that this was required on the basis of the Department's submissions in this case. I understand that the Department may treat this as a supersession request of the decision of 22 March 2022. The tribunal should investigate the progress of that claim and the Department should be mindful that if the tribunal reaches a decision on the appeal from the decision of 22 March 2022, that it will be the tribunal's decision that is the subject matter of any supersession.

(signed): O Stockman

Commissioner

22 February 2024