

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 29 August 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 OM/1187/23/02/D.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(a) of the Social Security (NI) Order 1998 and I give the decision that the tribunal should have given, without making further findings of fact.
3. I decide that the appellant is entitled to the standard rate of the daily living component from 22 August 2022.

REASONS

Background

4. The appellant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 22 August 2022 on the basis of needs arising from an imperforate anus, Anti-Grade Colonic Enema (ACE) procedure, anxiety and depression. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 14 September 2022. A factual report was obtained from his general practitioner (GP). The appellant was invited to participate in a telephone consultation with a healthcare professional (HCP) and the Department received an audited report of the consultation on 6 January 2023. On 18 January 2023 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and

including 22 August 2022. The appellant requested a reconsideration of the decision, submitting further evidence. A supplementary advice note was obtained by the Department from a HCP. The appellant was notified that the decision had been reconsidered by the Department but not revised. He appealed.

5. The appeal was considered at a hearing on 29 August 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 27 June 2024 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant submits that the tribunal has erred in law by failing to give adequate reasons for the decision and by failing to make sufficient findings of fact.
7. 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. He indicated that the Department supported the application on the issue of adequacy of reasons.

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 the Department's submission, containing the PIP2 questionnaire completed by the appellant, a letter from a stoma nurse, a GP factual report, an audited report from the HCP based on a telephone consultation, correspondence and a supplementary advice note from a HCP. The tribunal also had sight of the appellant's medical records. The appellant attended the hearing and gave oral evidence. The Department was not represented.
9. The tribunal accepted that the appellant had a congenital imperforate anus, which currently results in a requirement for an ACE procedure to irrigate and evacuate his bowel, involving insertion of a litre of fluid daily via a "Mickey button" accessed from a stoma site. It also accepted that the appellant suffered from depression and anxiety, currently treated by medication. It observed his evidence that he had no physical problem walking, except after a "washout", which he would do in the mornings for one and a half to two hours before work. It found that he would not have difficulty walking for the majority of the time. It noted his evidence that he would have difficulty with planning and following a journey, due to the risk

of soiling himself if too far from a toilet. It did not accept that he would have difficulty planning and following a journey in light of his ability to drive to work daily and his ability to use satellite navigation, if required. It therefore awarded no points for mobility activities.

10. In relation to the daily living activities, it accepted that he needed assistance to manage his toilet needs, awarding 4 points for descriptor 5.d. It also accepted that he needed assistance with preparation of his irrigation device. It found that such assistance was up to 30 minutes per day – or 3.5 hours per week – awarding 2 points for descriptor 3.c. It did not accept that the appellant had significant limitations in terms of the remaining disputed activities – including activity with preparing food, dressing/undressing, washing/bathing or engaging with others. As it awarded 6 points, which was below the relevant threshold of 8, the tribunal disallowed the appeal.

Relevant legislation

11. 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.
12. 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.
13. One PIP activity that is particularly relevant in the present case is activity 5. This is as set out below:

5. Managing toilet needs or incontinence.

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|--|---|
| a. Can manage toilet needs or incontinence unaided. | 0 |
| b. Needs to use an aid or appliance to be able to manage toilet needs or incontinence. | 2 |
| c. Needs supervision or prompting to be able to manage toilet needs. | 2 |
| d. Needs assistance to be able to manage toilet needs. | 4 |

e. Needs assistance to be able to manage incontinence of either bladder or bowel. 6

f. Needs assistance to be able to manage incontinence of both bladder and bowel. 8

14. 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

15. 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.
16. 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.
17. 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.
18. The appellant submits that the tribunal has erred in law on the basis that it has not given sufficient reasons for its decision or made sufficient findings of fact. He submits that it has erred by not finding that he is incontinent of the bowel and by not awarding 6 points under activity 5.e. He further submits that it did not have evidence on which to base the finding that he needed assistance for under 30 minutes each day and that it should have had greater regard to the evidence of the stoma nurse.
19. Mr Clements for the Department has made observations on the application. He supports the submission of the appellant regarding activity 5, and in particular that the tribunal has erred by not explaining why it did consider that the appellant met the conditions for managing incontinence as opposed to managing toilet needs. However, he submits that it is not clear that activity 3 is apt as he submits that the ACE procedure is not therapy for the purposes of PIP legislation, as it is a procedure more akin to self-catheterisation.
20. I consider that the appellant has set out an arguable case of error of law and I grant leave to appeal on the basis of his submission regarding activity 5.
21. The tribunal had awarded 4 points for activity 5.d, accepting that the appellant needed assistance to manage toilet needs. In Schedule 1 to the 2016 Regulations, "toilet needs" are defined as "getting on and off an unadapted toilet, evacuating the bladder and bowel, and cleaning oneself afterwards". By contrast "managing incontinence" means "manage involuntary evacuation of the bowel or bladder, including use a collecting device or self-catheterisation, and clean oneself afterwards". Whereas the evidence in the case did not indicate use of a collecting device or self-catheterisation, the use of the word "including" means that the definition is not restricted to using those particular devices only.

22. The evidence in the case established that the appellant was born without an opening to his anus and no related sphincter muscles that would otherwise have controlled evacuation of the bowel. He required a colostomy as a baby, which was reversed in childhood. He now follows the ACE procedure described above for up to two hours daily to irrigate his bowel and wash out faecal matter. He has no voluntary control over his bowel.
23. I fully accept the submission of the appellant that the tribunal, having accepted that he required assistance, erred in finding that the assistance was to be able to manage toilet needs under descriptor 5.d. It related instead to assistance to be able to manage incontinence of the bowel, and the appropriate scoring descriptor was 5.e. This would lead to an award of 6 points for activity 5.
24. The tribunal had awarded 2 points for activity 3, which when combined with 6 points, would normally lead to an award of the standard rate of daily living component. However, Mr Clements submits that the descriptor chosen by the tribunal does not apply in the present case. He refers to a decision of Upper Tribunal Judge Bano in *AH v Secretary of State for Work and Pensions* [2017] UKUT 104. Judge Bano was considering a case where a claimant was awarded points under activity 5.b for requiring to use a catheter as an aid to manage bladder incontinence, and also claimed points under activity 3 for assistance to manage therapy in connection with using the catheter. Judge Bano said at paragraph 9:
9. In my judgment, that well-established principle applies with perhaps even greater force where, as in this case, there is no indication in the statutory scheme that a claimant should benefit twice over from the same condition. Activity 5 represents an attempt to calibrate toilet needs and problems resulting from incontinence in terms of their severity, and I consider that that intention may be undermined if some situations which are specifically provided for in Activity 5 are also held to fall within the more general provisions of Activity 3. There may be situations in which assisting a person with catheterisation may form part of treatment which amounts to therapy for the purposes of Activity 3, but I do not consider that by itself assisting a person to catheterise falls within the scope of that Activity.
25. Mr Clements submits that the ACE procedure can be seen as a form of self-catheterisation for the purpose of the 2016 Regulations. While accepting that the appellant receives help with the ACE procedure, by analogy with *AH v SSWP*, he submits that this is not assistance with therapy and that points cannot also be awarded under activity 3.
26. However, it appears to me that *AH v SSWP* was decided on its own facts. Whereas *AH v SSWP* was addressed to the issue of a need to assistance inserting a catheter, the circumstances of the present case are broader. The tribunal here had accepted evidence from the stoma nurse that the appellant needed help to prepare his irrigation device, that the Mickey button device needed to be cleaned and flushed daily and that he needed

help with monitoring the health of damaged skin due to faecal seepage and applying treatment. I accept the findings of the tribunal and consider that this activity – which is separate from the appellant actually carrying out the irrigation procedure - reasonably amounted to managing therapy for up to 30 minutes a day or up to 3.5 hours a week. I do not accept the submission of Mr Clements to the effect that this was an error of law.

27. For the reasons given above in relation to activity 5, I consider that the tribunal has erred in law. I allow the appeal. I set aside the decision of the appeal tribunal and I give the decision that the tribunal should have given, without making further findings of fact.
28. I award 2 points for activity 3.c. I award 6 points for activity 5.e. As this amount to 8 points, I decide that the appellant is entitled to the standard rate of the daily living component from and including 22 August 2022.
29. I have considered whether a fixed term award would be appropriate. However, in the light of his condition it does not appear to me that the circumstances of the appellant are likely to change. Therefore I have decided that an indefinite award is appropriate.

(Signed): O STOCKMAN

COMMISSIONER

13 November 2024