

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 21 March 2024

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 BE/5169/19/03/D.
2. For the reasons I give below, 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 direct that the appeal shall be determined by a newly constituted tribunal.

REASONS

Background

3. The appellant had previously been awarded disability living allowance (DLA) from 26 January 2011, most recently at the low rate of the mobility component and the middle rate of the care component. As her award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, she claimed personal independence payment (PIP) from the Department for Communities (the Department) from 30 November 2018 on the basis of needs arising from severe depression and anxiety, drug and alcohol addiction, and joint pains in back, knees and wrists.
4. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 27 December 2018. She asked for evidence relating to her previous DLA claim to be considered. The appellant was asked to attend a consultation with a

healthcare professional (HCP) and the Department received an audited report of the consultation on 25 February 2019. On 19 March 2019 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 30 November 2018. The appellant requested a reconsideration of the decision, submitting further evidence. The Department obtained a supplementary advice note. The appellant was notified that the decision had been reconsidered by the Department and revised, to award her the standard rate of the daily living component from 17 April 2019 to 5 February 2023. She appealed.

5. The appeal was considered at a hearing on 21 March 2024 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal but maintained the level of award previously accepted by the Department. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 8 May 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 2 October 2024. On 24 October 2024 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant, represented by Ms McCabe of Law Centre NI, submits that the tribunal has erred in law by reason of procedural unfairness arising from the refusal of a postponement to obtain further medical evidence.
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 materially erred in law. He indicated that the Department supported the application on fairness grounds. However, on a different basis he also questioned whether the tribunal had jurisdiction to hear the appeal, in circumstances where the appellant had withdrawn her appeal, but subsequently had it re-instated by the Appeals Service.

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 and a consultation report from the HCP. It had a copy of the appellant's medical records and copies of correspondence relating to her application for a postponement of the hearing. The hearing was scheduled on BT Meet Me telephone conference and the appellant participated, accompanied by her representative Ms McIlmoyle. The tribunal noted that no adjournment was requested. It heard evidence relevant to the daily living activities, except managing toilet needs, communicating verbally, reading and understanding and the mobility activities.

9. The tribunal noted that the appellant was on a low dose of anti-depressant and had input from the community mental health team, community psychiatric nurse, psychology and psychiatry. It noted that she had a long history of alcohol dependency. However, it observed that she was able to look after two small children at the relevant time, albeit with some support. It accepted that she should be awarded 2 points for washing and bathing (4.c), 2 for dressing and undressing (6.c.i) and 4 for engaging with other people (9.c), awarding 8 points for daily living. It did not award points for mobility activities. It therefore allowed the standard rate of the daily living component and disallowed the mobility component.

Relevant legislation

10. 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.
11. 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.
12. 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

13. 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.
14. 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.
15. 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.
16. The appellant, represented by Ms McCabe of Law Centre NI, submitted that the proceedings had been unfair. She had requested a postponement to obtain further medical evidence but this was refused. The tribunal had then proceeded to determine the appeal without the additional evidence. The evidence that the appellant had wished to submit consisted of psychiatric notes from 2019 on the basis that this was a little hard for her to remember.

17. For the Department, Mr Clements expressed support for the application on a number of grounds. Whereas he submitted that the appellant's representatives had ample time to obtain medical evidence, and that her GP records were before the tribunal, he noted that the tribunal in refusing to allow further time to obtain medical evidence did not focus on the adequacy of the medical evidence before it, but rather the number of previous adjournments. He submitted that, for the reasons given in *SG v DfC* [2013] NI Com 12, this was not a legitimate factor.
18. Mr Clements was critical of other aspects of the tribunal's decision. It had awarded points for 9.c, which implied a need for social support to engage with others, whereas there was no evidence of this. In its decision the tribunal had referred to a need for prompting, which might have given a basis for an award of 2 points under 9.b only. However, he observed that the tribunal had removed points that had been accepted by the Department for preparing a main meal and managing medication without advising the appellant that these were at risk, contrary to requirements of fairness.
19. He submitted that the tribunal barely addressed the activity of managing medication, against a background of clinical evidence that showed difficulties with compliance. He also observed that the appellant's ability to make food for her children did not necessarily translate into an ability to prepare a cooked main meal for herself. He observed that the tribunal had not addressed the need for prompting in this context.
20. In light of the Department's support for the appeal I accept that there is an arguable case and I grant leave to appeal.
21. However, Mr Clements made a further submission about the background administration of the case. He observed that the particular appeal had been withdrawn on 18 November 2022. This had been done at the hearing centre immediately before it was due to be heard. It had later been re-instated after the appellant submitted that she was not mentally well due to extreme anxiety and could not have made an informed consent to withdrawal. The President of Appeal Tribunals on 23 March 2023 had accepted that there had not been an informed consent to withdrawal and accepted that it should be re-instated.
22. Mr Clements relied on the decision of former Chief Commissioner Mullan in *KEN v Department for Social Development* [2012] NI Com 344, where he said "where an appeal is validly withdrawn then the appeal tribunal, and onward a Social Security Commissioner, have no jurisdiction to consider it ...". He made reference also to *Rydvqvist v Secretary of State for Work and Pensions* [2002] EWCA Civ 947. He submitted that the tribunal had no jurisdiction to hear a withdrawn appeal.
23. I observe that in *Rydvqvist* there was no evidence offered to support an argument that the withdrawal of the appeal was not effective. It had been done by solicitors on the claimant's behalf in what appears to have been a tactical error. In the circumstances of the particular case, while the

withdrawal was referred to in the adjudication officer's submission, he proceeded to address the substantive issue in the appeal without challenging the basis for proceeding. The tribunal did not address the issue of withdrawal at all but appeared to assume that it was able to proceed. However, Great Britain Commissioner Levenson later found that it had no jurisdiction to determine the appeal as the appeal was validly withdrawn.

24. Here the President of Appeal Tribunals made a direction under regulation 38(2) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the Decisions and Appeals Regulations). This is the power to give such directions "as he may consider necessary or desirable for the just, effective and efficient conduct of the proceedings". The President concluded that the appellant's withdrawal of her appeal on 18 November 2022 may not have been an "informed" withdrawal and directed that the appeal should be reinstated.
25. I consider that the position in the present case can be distinguished from that in *Rydqvist*. In *Rydqvist*, there had been no challenge to the effectiveness of the withdrawal, or indeed any consideration of the effect of the withdrawal. Here, the effectiveness of the withdrawal was challenged. It had been submitted by the appellant that,

"I was not of sound mind when given the advice to withdraw... my mental health was so bad I could barely get by going to the place. I was totally unaware of what I was doing at the time... my anxiety was through the roof and I could barely speak... I was physically sick and I also could not face the panel. I was everywhere my mind and body overtaken by anxiety. My thinking was unstable and I feel now after calming down that I was so unstable to know what I was actually doing. I ask that you kindly consider my request for the appeal to be re-instated as it deserves a hearing when I'm not so unstable".
26. The medical evidence of anxiety would tend to support the description of the appellant's mental condition. There is nothing to suggest that the exercise of discretion in the case was unlawful, irrational or generally contrary to principle.
27. *Rydqvist* was decided at a time when regulation 6 of the Social Security Adjudication Regulations 1995 was still in operation and governed withdrawal of appeals. This provision was broadly similar to regulation 40 of the Decisions and Appeals Regulations. However, the Court of Appeal in England and Wales, at paragraph 16 of Peter Gibson LJ's judgement, indicated that there was no provision in those 1995 regulations to reinstate a withdrawn appeal. In the present day, there is a broad power to give directions in regulation 38 of the Decisions and Appeals Regulations. The President of Appeal Tribunals here used the power in regulation 38(2) to

give a direction for the just conduct of proceedings and it appears sufficiently broad to encompass reinstatement of a withdrawn appeal.

28. In *SEN v DSD*, the former Chief Commissioner set aside the decision of the tribunal to accept the withdrawal of the proceedings, on the basis that an appointee had not been present when the withdrawal form was completed. He made it clear that the circumstances were particularly unusual and essentially found that the tribunal had acted in a way that was procedurally unfair.
29. Here the tribunal did not make any decision about the validity or otherwise of the withdrawal. That decision had been given by the President on 23 March 2023. A direction under regulation 38 is not something that gives rise to an appeal and is therefore not something that the tribunal itself had jurisdiction to overturn. Mr Clements submits that the tribunal lacked jurisdiction to hear the appeal. However, I consider that it could not itself have overturned the President's direction and that it was correct of it to accept that direction at face value. Similarly, I do not consider that I have jurisdiction to overturn the tribunal's decision or to rule that it itself lacked jurisdiction.
30. It appears to me that if a challenge to the reinstatement of the appeal on 23 March 2023 was to be made, it would have to be done by way of a direct challenge to the President's decision. The proper way to go about that, it appears to me, is to apply for leave to bring judicial review proceedings in the High Court. Otherwise, the reinstatement of the appeal must be respected.
31. On the grounds advanced by the appellant and on the basis of the support of Mr Clements in relation to the substantive findings of the tribunal, I accept that the tribunal has erred in law. I allow the appeal and I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.

(Signed): O STOCKMAN

COMMISSIONER

13 February 2025