

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 18 December 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. As will be explained in greater detail below, both parties have expressed the view that the decision appealed against was erroneous in point of law.
2. Accordingly, pursuant to the powers conferred on me by Article 15(7) of the Social Security (Northern Ireland) Order 1998, I allow the appeal, I set aside the decision appealed against and I refer the case to a differently constituted tribunal for determination.
3. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of his entitlement to Personal Independence Payment (PIP) remains to be determined by another appeal tribunal.
4. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:
 - (i) The decision under appeal is a decision of the Department, dated 7 October 2016, which decided that the appellant was not entitled to PIP from and including 14 July 2016;
 - (ii) The Department is directed to provide details of any subsequent claims to PIP and the outcome of any such claims to the appeal tribunal to which the appeal is being referred.
 - (iii) It will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and

- (iv) It will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

Background

5. On 7 October 2016 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 14 July 2016. Following a request to that effect the decision dated 7 October 2016 was reconsidered on 29 November 2016 but was not changed. An appeal against the decision dated 7 October 2016 was received in the Department on 29 December 2016.
6. The appeal was first listed for oral hearing on 12 April 2017. The appeal was adjourned for the purpose of obtaining a complete set of the appellant's General Practitioner (GP) records.
7. The substantive appeal tribunal hearing took place on 18 December 2017. The appellant was present and was represented by Ms Williams of the Citizens Advice organisation. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 7 October 2016.
8. On 23 April 2018 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). On 10 May 2018 the Legally Qualified Panel Member (LQPM) determined that the application had been received outside of the prescribed time limits for making such an application and that special reasons did not exist to extend those time limits. The application was, accordingly, rejected by the LQPM.

Proceedings before the Social Security Commissioner

9. On 29 May 2018 a further application for leave to appeal was received in the office of the Social Security Commissioners. The appellant was, once again, represented in this application by Ms Williams. On 26 June 2018 observations on the application for leave to appeal were requested from Decision Making Services ('DMS'). In written observations dated 18 July 2018, Mr Williams, for DMS, supported the application for leave to appeal on certain of the grounds submitted on behalf of the appellant. Written observations were shared with the appellant and Ms Williams on 18 July 2018.
10. On 29 January 2019 I granted leave to appeal. In granting leave to appeal, I gave, as a reason that certain of the grounds of appeal, as set out in the application for leave to appeal, were arguable. On the same date I determined that an oral hearing of the appeal would not be required.

Errors of law

11. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
12. In *R(I) 2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:
 - “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
 - (ii) failing to give reasons or any adequate reasons for findings on material matters;
 - (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
 - (iv) giving weight to immaterial matters;
 - (v) making a material misdirection of law on any material matter;
 - (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

Analysis

13. In the application for leave to appeal, which was received in the office of the Social Security Commissioners, Ms Williams submitted that the decision of the appeal tribunal was in error of law on a number of grounds including the following:

‘Not considering activity for engaging with people to an acceptable standard as due to mixed emotions and inability to be able to control same as he has a lot of difficulty engaging with people’

14. In his written observations on the application for leave to appeal, Mr Williams has made the following submission in response to this ground:

'The tribunal did not believe that engaging with people was a problem for (the appellant). In its reasoning the tribunal stated:

“The overwhelming evidence suggested that he was able to engage with medical professionals, he was able to engage with people at his work, he was able to engage with people when he went shopping for small items of groceries and when he went to buy aerosols in the shop. The report from Dr C of 4 March 2016, indicated that the Appellant at that stage spoke fluently, there was no speeding of his thoughts or over activity or defensiveness in his response to questioning. The Tribunal did not believe that he had any difficulty whatsoever engaging with other people nor did he need social support or prompting to be able to do so.”

In paragraph 43 of GB decision, *AB v SSWP [2017] UKUT 0217 (AAC)* Judge Ovey stated:

*“43. It is to be remembered that activity 9 is concerned with engagement of the kind envisaged by the definition of “engage socially” and it is therefore necessary to consider the ability to engage in a wider range of situations than simply situations involving family, established friends and professionals with clearly defined roles. This point is explained and illustrated by the decisions in *HJ v. Secretary of State for Work and Pensions*, *SF v. Secretary of State for Work and Pensions* and *PM v. Secretary of State for Work and Pensions* referred to in paragraph 35 above.”*

In addition, Judge Gray considered Activity 9 in GB decision *PM v SSWP (PIP) [2017] UKUT 0154 (AAC)* and stated in paragraph 12:

*“12. The definition of “engage socially” informs activity 9 (*SF-v-SSWP (PIP) [2016] UKUT 543 (AAC)*). It includes the ability to establish relationships. The ability,*

therefore, to engage with people known to her (family and existing friends) or with whom she needs to engage for a specific and limited purpose (health professionals or the tribunal) is insufficient to engage the baseline (zero scoring) descriptor. Further, there is no legal basis for limiting the assessment of her ability to engage with others face to face to such engagement as is reasonably necessary. The purpose of PIP, like DLA before it, is to assist those with disabilities to live, as far as possible, the life that they would wish to live, and any mitigating behaviour adopted because of that disability must be disregarded. As I said (in respect of an appellant with hearing difficulties) in EG-v-SSWP (PIP) [2017] UKUT 101 (AAC):

47. The statement of reasons reads as if the appellant could and should avoid certain consequences of her disability, for example the difficulties communicating with people in a noisy public space, by choosing a quiet environment, and it assessed her on that basis. This is the wrong approach. To assess the true effect of the disability in performing an activity, steps routinely taken to make that activity possible or easier must be filtered out; if that does not happen the descriptors that deal with the type of help needed are not being compared with the baseline criteria of a person without a relevant disability who, using activity 7 descriptor a as an example, “can express and understand verbal information unaided”. That descriptor does not envisage a person who is continually seeking out quiet locations in order to do so.

Although the tribunal appears to have considered (the appellant's) ability to engage with healthcare professionals, work colleagues and shop assistants, it does not appear to me to have adequately demonstrated that it has fully considered or investigated his ability to engage socially. I would therefore consider that there is merit in this issue raised by (the appellant) and his representative.'

15. It is clear, therefore, that both parties have expressed the view that the decision appealed against was erroneous in point of law.
16. Accordingly, pursuant to the powers conferred on me by Article 15(7) of the Social Security (Northern Ireland) Order 1998, I allow the appeal, I set aside the decision appealed against and I refer the case to a differently constituted tribunal for determination.
17. I would add that the principles in *SF v The Secretary of State for Work and Pensions* ([2016] UKUT 0543 (AAC)), *AB v SSWP* ([2017] UKUT 0217 (AAC)) and *PM v SSWP* ([2017] UKUT 0154 (AAC)) have not been doubted – see the commentary at paragraph 2.41 of Volume 1 of *Social Security Legislation 2017/2018*. To that I would add that in *HJ v SSWP* [2016] UKUT 0487 (AAC) – CPIP/2523/2016, the Judge of the Upper Tribunal held that the tribunal erred in law by failing to award points under activity 9. At paragraph 18 the Judge stated:

“...There is no indication in the regulations that the term “engage socially” is limited to engagement with people who a claimant knows. Indeed the use of the word “others” in the definition of “engage socially”, which is unqualified, strongly suggests that it is not so limited. Moreover the requirement to be able to establish relationships suggests that the activity is not limited to considering engagement with those known to a claimant. Although it is not itself a statement of law, I am reinforced in this by the PIP Assessment Guide published by the Department of Work and Pensions which states (page 122):

“When considering whether claimants can engage with others, consideration should be given to whether they can engage with people generally, not just those people they know well”.

18. I adopt and accept the reasoning and analysis of the Upper Tribunal in those cases, which, in my view, properly reflect the law in Northern Ireland.

(signed): K Mullan

Chief Commissioner

2 April 2019