

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 15 December 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is the Department's appeal from the decision of an appeal tribunal sitting at Belfast.
2. For the reasons I give below, I allow the Department's appeal. I consider that I can give the decision the tribunal should have given, under Article 15(8)(a)(i) of the Social Security (NI) Order 1998, without making further findings of fact.
3. I decide that the respondent is entitled to the standard rate of the daily living component of PIP from 4 October 2016 until 3 October 2018, thereby reducing the award from the enhanced rate of the daily living component.

REASONS

Background

4. The respondent claimed personal independence payment (PIP) by telephone from the Department for Communities (the Department) from 4 October 2016 on the basis of needs arising from autism. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 25 November 2016. He was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 21 February 2017. On 7 March 2017 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 4 October 2016. The applicant requested a reconsideration of the

decision, and he was notified that the decision had been reconsidered by the Department but not revised. He appealed, but waived his right to an oral hearing of the appeal.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on the papers on 15 December 2017 the tribunal allowed the appeal. The Department then requested a statement of reasons for the tribunal's decision and this was issued on 13 June 2018. The Department applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was granted by a determination issued on 3 December 2018. On 13 December 2018 the Department appealed to a Social Security Commissioner.

Grounds

6. The Department submits that the tribunal has erred in law on the basis that it had inappropriately awarded points under descriptor 7(c), which deals with communication, relying on the decision of Upper Tribunal Judge Hemingway in *Secretary of State for Work and Pensions v GJ* [2016] UKUT 8.
7. The respondent was invited to make observations on the Department's grounds. However, the respondent did not reply and has not participated in these proceedings.

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 respondent and a consultation report from the HCP, together with further medical evidence submitted to the Appeals Service on 25 October 2017. Additionally, the tribunal had sight of the respondent's medical records. The parties had not requested an oral hearing and no oral evidence was therefore given. On the papers, the tribunal upheld the Department's award of 4 points for mobility activities. In relation to daily living activities, it found that the respondent should be awarded 2 points for the activity of preparing food, 4 points for communicating verbally, 4 points for engaging with other people face to face, and 2 points for making budgeting decisions, totalling 12 points. It awarded the enhanced rate of the daily living component for a two year fixed period.
9. The tribunal found that the respondent had given evidence in keeping with a diagnosis of autism and anxiety. It considered the medical evidence and reports regarding the effect of the respondent's condition on his ability to perform daily living activities and the support received by the respondent from other people. It accepted that he needed prompting to prepare or cook a simple meal, communication support to be able to

express or understand complex verbal information, social support to engage with other people and prompting or assistance to make complex budgeting decisions.

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. The relevant scoring descriptors for the purpose of this appeal are set out at paragraph 7 of Part 2 of the Schedule to the 2016 Regulations. This provides:

PART 2

Daily living activities

Activity	Descriptors	Points
7. Communicating verbally.		
	a. Can express and understand verbal information unaided.	0
	b. Needs to use an aid or appliance to be able to speak or hear.	2
	c. Needs communication support to be able to express or understand complex verbal information.	4
	d. Needs communication support to be able to express or understand basic verbal information.	8

e. Cannot express or understand verbal information at all even with communication support.	12
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Another activity that was considered by the tribunal was activity 9. The relevant paragraph of the Schedule provides as follows:

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|--|---|
| 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 – | 8 |
| (i) overwhelming psychological distress to the claimant, or | |
| (ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person. | |

Hearing

13. I held an oral hearing of the appeal. The Department was represented by Mr Williams. The respondent did not attend and was not represented.
14. Mr Williams submitted that the tribunal had erred in deciding that descriptor 7c applied to the respondent. He referred me to Great Britain Upper Tribunal decision *Secretary of State for Work and Pensions v AS* [2017] UKUT 454. In that case, he submitted, Judge Lane highlighted that a claimant may be able to communicate in short sentences, but may have difficulties relating to others as required for Activity 9. He referred to another GB decision, *Secretary of State for Work and Pensions v GJ* [2016] UKUT 0008, in which Judge Hemingway considered whether anxiety is relevant to the scoring of points under Activity 7 in addition to Activity 9. Judge Hemingway accepted that anxiety caused by mental health difficulties could potentially lead to the scoring of points under

activity 7, if the anxiety was so severe as to impair a claimant's ability to communicate as well as to engage. However, Judge Hemingway also pointed out that this was unlikely and highlighted that there is a distinction between the two activities and the skills that are being tested. Judge Hemingway considered it important to establish the cause of a claimant's communication problems.

15. Mr Williams contended that the evidence in this case suggests that the respondent can express and understand verbal information unaided with people he knows well or is comfortable with. He suggested that it was the respondent's anxiety related problem with engaging with other people that stops him from communicating unaided, rather than an actual problem with communication. The tribunal had appropriately awarded points in respect of this problem under activity 9, 'Engaging with other people face to face'.

16. Mr Williams observed that Part 1 of Schedule 1 to the 2016 Regulations provides the following interpretations:

"basic verbal information" means information in C's native language conveyed verbally in a simple sentence;

"complex verbal information" means information in C's native language conveyed verbally in either more than one sentence or one complicated sentence;

17. He submitted that, as Judge Lane pointed out in Paragraph 5 of *SSWP v AS*, the standard of verbal communication required by a claimant to be considered capable of Activity 7 is therefore relatively low. Judge Lane said:

"5. The standard a claimant has to reach is very low. If most of the time a claimant is able to understand and speak two short sentences or one long one without the support of an experienced person, she won't score points under the descriptor the tribunal chose for this claimant."

18. Mr Williams observed that the respondent reported to the Disability Assessor that he could communicate with his family; he could be understood by the Disability Assessor; he was able to follow his medical assessment and he is able to attend college. He noted that a letter dated 23 October 2017 indicated that the respondent receives support with college, although there was no indication as to what this support entails.

19. Mr Williams submitted that the available evidence was consistent with the respondent having problems engaging with other people face to face and that the tribunal had awarded points appropriately for this in selecting 9(c). However, in respect of Activity 7 he submitted that the tribunal had failed to consider the relevant definitions and the low level of communication skills required by a claimant for activity 7 to apply.

Assessment

20. It is evident that activity 7 and activity 9 are addressed to different matters. Activity 7 relates to understanding and being understood, whereas activity 9 relates to difficulty engaging socially regardless of the claimant's level of communication skills. It is entirely possible that a claimant will attract points for both activities. It is also possible that the same disability might result in a claimant satisfying descriptors within each activity. However, they remain different activities and the evidence must establish that relevant descriptors are satisfied under each.
21. In this case, it was accepted by the tribunal that the respondent suffered from autism and anxiety. No issue was taken by the Department with the tribunal's award of points for descriptor 9(c) or its finding that the respondent needed social support to be able to engage with other people.
22. However, the tribunal also found that the respondent needed **communication support** to be able to express or understand **complex verbal information**. "Communication support" is defined in Schedule 3 of the 2016 Regulations. It means "support from a person trained or experienced in communicating with people with specific communication needs, including interpreting verbal information into non-verbal form and vice versa". An obvious form of communication support might be sign language interpretation. However, the expression is defined in an open way and it is not confined to such support.
23. However, the evidence, as submitted by Mr Williams, indicated that the respondent was able to communicate with family members, at school and in his present Art and Design foundation course. The medical assessor found that the respondent had no problem communicating. The respondent had said that he doesn't "get" things and sometimes needed someone to explain the meaning or hidden meaning behind things. Evidence in the form of the diagnostic assessment of possible Autistic Spectrum Disorder reported him saying that he had difficulties understanding what is being said to him, taking things literally, and difficulties understanding implied meaning, jokes and sarcasm.
24. The respondent did not attend the tribunal hearing. Therefore the tribunal had no better insight into the respondent's ability to communicate than I have on the basis of the papers before me. It appears to me that the respondent was reporting difficulties with understanding ironic or humorous remarks, where the meaning of what was being said was not intended to be taken literally. However, the evidence did not generally indicate that the respondent had difficulty communicating.
25. The descriptor that was chosen by the tribunal deals with the claimant's ability to understand information in his native language conveyed verbally in either more than one sentence or one complicated sentence. I do not

doubt that from time to time the respondent may be left in a position of failing to understand something said to him for the reason that it includes irony or humour. However, I consider that the descriptor has to be applied in the context of ordinary communication at home, at college or in other aspects of day to day life. The use of irony or humour is a narrow part of such everyday communication.

26. I agree with Judge Lane in *SSWP v AS*, when she said that the standard a claimant has to reach is very low. If the respondent can understand more than one sentence or one complicated sentence in the course of ordinary day to day communication, the descriptor will not be satisfied. It appears to me that it was not open to the tribunal to conclude that the communication difficulties of the respondent reached the statutory threshold, namely that he could not understand a complicated sentence or more than one sentence.
27. For this reason, I consider that the tribunal has erred in law and that I must allow the appeal and set aside the decision of the appeal tribunal.

Disposal

28. No issue is taken by the Department as to the applicability of the remaining descriptors found by the tribunal. I have decided therefore to give the decision the tribunal should have given without making further findings of fact.
29. Under Article 15(8)(a) of the Social Security Order (NI) 1998 I find that the respondent satisfies descriptor 1(d), 9(c) and 10(b) of the Daily Living activities, scoring 8 points, and descriptor 1(b) of the Mobility activities, scoring 4 points.
30. As he satisfies the relevant threshold of 8 points in regulation 5(3)(a) of the 2016 Regulations, I conclude that the respondent has limited activity to carry out daily living activities and is entitled to PIP at the standard rate of the daily living component from 4 October 2016 until 3 October 2018.

(signed): O Stockman

Commissioner

1 October 2019