

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 29 May 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 29 May 2018 is in error of law. The error of law identified will be explained in more detail below. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.
2. I am unable to exercise the power conferred on me by Article 15(8)(a) of the Social Security (Northern Ireland) Order 1998 to give the decision which the appeal tribunal should have given. This is because there is detailed evidence relevant to the issues arising in the appeal, including medical evidence, to which I have not had access. An appeal tribunal which has a Medically Qualified Panel Member is best placed to assess medical evidence and address medical issues arising in an appeal. Further, there may be further findings of fact which require to be made and I do not consider it expedient to make such findings, at this stage of the proceedings. Accordingly, I refer the case to a differently constituted appeal tribunal for re-determination.
3. In referring the case to a differently constituted appeal tribunal for re-determination, I direct that the appeal tribunal takes into account the guidance set out below.
4. 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), for a particular period, remains to be determined by another appeal tribunal.

Background

5. On 21 July 2017 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 31 March 2017. Following a request to that effect, the decision dated 21 July 2017 was reconsidered on 16 August 2017 but was not changed. An appeal against the decision dated 21 July 2017 was received in the Department on 11 September 2017.
6. The appeal tribunal hearing took place on 29 May 2018. The appellant was present. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision dated 21 July 2017. The appeal tribunal did apply descriptors from Part 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 (the 2016 Regulations) which the decision maker had not applied. The score for these descriptors was insufficient for an award of entitlement to the daily living component of PIP at the standard rate – see article 83 of the Welfare Reform (Northern Ireland) Order 2015 and regulation 5 of the 2016 Regulations.
7. On 11 December 2018 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). The appellant was represented in the application by Mr Black of the Law Centre (Northern Ireland). On 14 January 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

8. On 6 February 2019 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 21 February 2019 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 6 March 2019, Mr Hinton, for DMS, supported the application for leave to appeal on two of the grounds submitted on behalf of the appellant. Written observations were shared with the appellant and Mr Black on 6 March 2019. Further correspondence was received from Mr Black on 8 March 2019 in which he indicated that in light of the Department's written observations he had no further comment to make.
9. On 30 July 2019 I granted leave to appeal. In granting leave to appeal, I gave as a reason that 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

10. 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?

11. 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.”

Submissions of the parties

12. In the application for leave to appeal which was received in the Office of the Social Security Commissioners, Mr Black submitted that the appeal tribunal had erred in law by ‘... making a material misdirection in law in how it applied the requirement that activities must be performed “safely” and the need for supervision.’
13. More particularly, Mr Black noted that the appeal tribunal had applied point-scoring descriptors in connection with activity 1 in Part 2 of Schedule 1 to the 2016 Regulations on the basis that he needed supervision and assistance in preparing and cooking a simple meal. Mr Black asserted that the application of this descriptor was on the basis of the appellant’s epilepsy and consequent inability to perform the activities associated with that activity safely given the risk of having a seizure.
14. Mr Black submitted that if the appeal tribunal had accepted that there was a risk to safety in preparing a meal, then it followed that a similar risk and similar considerations arose in relation to the appellant’s ability to follow a route outdoors. In support of this submission he cited the decision of a Three-Judge Panel of the Administrative Appeals Chamber of the Upper Tribunal in *RJ, GMcL and CS v Secretary of State for Work*

and Pensions (PIP), ([2017] AACR 32). He noted that a significant part of the decision was taken up with the interpretation of ‘safely in regulations 4(2A) and 4(4) of the Personal Independence Payment Regulations 2013 (‘the 2013 Regulations’). The 2013 Regulations are the Great Britain equivalents of the 2016 Regulations in Northern Ireland and, as Mr Black has observed, regulations 4(2A) and 4(4) of the 2013 Regulations have an equivalence in regulations 4(3) and 4(5) of the 2016 Regulations.

15. Mr Black observed that after reviewing relevant authorities and other materials, the Three-Judge Panel, at paragraph 56, arrived at the following conclusion on the meaning of ‘safely’:

‘Safety and supervision: overall conclusion

56. In conclusion, the meaning of “safely” in regulation 4(2A) and as defined in regulation 4(4) is apparent when one considers the legislation as a whole and with the assistance of the approach by the House of Lords to the likelihood of harm in the context of protecting people against future harm. An assessment that an activity cannot be carried out safely does not require that the occurrence of harm is “more likely than not”. In assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant. The same approach applies to the assessment of a need for supervision.’

16. The Three-Judge Panel then sought to apply that definition to discrete activities as they arose in the individual appeals before them. At paragraphs 69 to 74, they said the following about the mobility activities:

‘69. Regulation 4 applies to the assessment of a person’s ability to carry out all activities and therefore our analysis of regulation 4(2A)(a) and 4(4)(a) applies to the assessment of a person’s ability to carry out the mobility activities.

70. After the hearing of these appeals in the Upper Tribunal, another three-judge panel of the Upper Tribunal issued its decision in *MH v Secretary of State for Work and Pensions (PIP)* [2016] UKUT 531 (AAC). That appeal concerned the approach to the mobility descriptors, particularly mobility activity 1. At [37] the Upper Tribunal said that, applying regulation 4(2A)(a), a person who cannot walk along a pavement or cross a

road safely by himself because he is at risk of having a fit and so needs supervision to do so, is unable safely to follow a route and satisfies descriptor 1f. We consider that the same analysis applies to a claimant who is unable to follow a route safely because he or she is unaware of dangers due to a sensory or cognitive impairment. [2017] AACR 32 (RJ v SSWP) (Three-Judge Panel) 21

71. The Upper Tribunal in *MH* also decided that mobility activity 2 will not apply unless a claimant is physically unable to stand and then move. The physical limitations may emanate from a mental health or a physical condition but not where descriptor 1e is satisfied by reason of the same mental condition ([51] and [52]).

72. We turn now to the individual appeals in relation to the mobility activities.

73. The First-tier Tribunal awarded four points to RJ under mobility descriptor 1b. In this appeal Mr Leigh submitted that, having found that there was a “genuine risk that she may at any time suffer a seizure”, the tribunal erred in focussing on her loss of confidence in going out as a result of the risk rather than the risk itself. He argued that, just as RJ required supervision in order to prepare a meal, she required supervision when going outside in order to keep safe. That meant that mobility descriptor 1f applied. Alternatively, if she could not walk any distance safely because of the risk of a seizure, then that may mean that she could not move for any of the prescribed distances in mobility activity 2. In *GMcL*’s case, the tribunal awarded four points for mobility descriptor 1b. The tribunal found that he did not go out alone for fear of suffering a seizure, but in the light of the infrequency of seizures the tribunal did not consider that he reasonably required the assistance of another person outdoors and so did not award points for descriptor 1f.

74. It follows from our analysis that, in the cases of RJ and *GMcL*, the tribunals erred in law in failing to consider whether mobility descriptor 1f applied as a result of the risk of suffering a seizure. No issue could arise on these facts as to mobility activity 2.’

17. Mr Black concluded by asserting that:

‘... just because the claimant’s seizures are infrequent and because he has not as yet suffered injury by having one while moving around, does not mean that supervision

is not required when he is doing so. In failing to award points under mobility, we therefore submit that the tribunal has erred in law.'

18. In his written observations on the application for leave to appeal, Mr Hinton made the following submissions:

(The appellant's) representative made reference to a decision of the GB Upper Tribunal – *RJ, GMcL and CS v Secretary of State for Work and Pensions [2017] UKUT 105 (AAC) (CPIP/1599/2016)*. Two of the three appellants in the aforementioned decision suffered from a similar condition to (the appellant), ie epileptic seizures. The panel of judges held that even though seizures occurred infrequently, this was not sufficient reason to find that supervision was not required. The correct test to be applied is whether there is a real possibility that cannot be ignored of harm occurring. Consequently this analysis should be applied to (the appellant) because he couldn't walk along a pavement or cross a road safely because he would be at risk of having a seizure. (The appellant's) representative also made the point that he had been awarded points on the basis that he needed assistance in preparing and cooking a simple meal. The tribunal had in fact awarded (the appellant) 4 points under Activity 1(e) – *"Needs supervision or assistance to either prepare or cook a simple meal"*. Consequently, (the appellant's) representative made the point that the points awarded here were on the basis that he could not perform this activity safely due to the risk of suffering an epileptic seizure. Therefore, the same consideration should have been given in relation to (the appellant's) ability to follow a route outdoors. (The appellant's) representative referred to paragraphs 56 and 69 to 74 of the aforementioned decision. Consequently it is contended that the tribunal in applying the above criteria should have awarded points under mobility descriptor 1.

...

The tribunal in its reasoning referred to the legislative requirements in assessing (the appellant's) ability to carry out each of the activities – Regulation 4(3) of the Personal Independence payment Regulations (NI) 2016. It also stated:

"...The appellant quite properly took issue with the assessor's contention that because he did not suffer from seizures the majority of the time (the 50% rule) the terms of the

descriptors were not fulfilled. To this end he provided an article entitled "safety and supervision ruling could mean PIP for many more claimants". The Tribunal in dealing with this appeal gave full consideration to the nature and frequency of the appellant's seizures and the risk of harm occurring and the need for supervision".

The tribunal then reached the following conclusions regarding mobility activity 1 – planning and following journeys:

"The appellant claimed that he needed someone with him when outdoors to make sure he was safe. He stated he needed help if he went on public transport and supervision to ensure his safety. He pointed out that he would be a danger to himself and others if he was near or on a road.

In oral evidence the appellant accepted he had no difficulty finding his way and asking directions when outdoors and the main issue was that he was fearful if crossing the road and needed someone with him. He could recall no incidents when out walking with his wife when he had been at risk or she had needed to intervene. He gave evidence of an episode when he had blacked out at a concert in the 90's and also had had an absence on the bus returning home when he had gone past his destination and had lost time. He had been able to get another bus home on that occasion. He worked full time in a desk based job for almost 4 years. He had never needed assistance in work and had no special arrangements in place. There was no evidence of any cognitive, intellectual or memory impairment. The Tribunal accepted the conclusions of the Healthcare Professional as detailed at page 20 of the report dated 07/07/17 that the appellant could plan and follow the route of a journey unaided safely, to an acceptable standard, repeatedly and within a reasonable time frame. The Tribunal considered that the appellant did not fall within the remit of the

descriptors in this activity and awarded no points”.

The above reasoning gives me cause for concern because, in my opinion the tribunal has applied inconsistent logic regarding the issue of the risk of harm occurring. I would refer to the tribunal’s deliberations with regards to the activity of preparing food. The tribunal concluded thus:

“...The Tribunal accepted that some aspects of cooking would be dangerous for the appellant in the event of a seizure and that he avoided hot food and liquids, sharp knives and hot items such as hobs/ovens. Taking account of the issue of safety in the kitchen and given that the control of his seizures was not optimal, the Tribunal accepted there was a need for supervision and assistance in preparing and cooking a simple meal. Accordingly the Tribunal awarded 4 points for activity (e)”.

In a similar vein the tribunal reached similar conclusions regarding the activity of washing and bathing:

“...The Tribunal accepted that control of the appellant’s seizures was sub-optimal and that he had no warning of such seizures. In consideration of the increased risk to the appellant when bathing the Tribunal concluded he would need supervision. Accordingly the Tribunal awarded 2 points for activity 4(c) on the basis that the appellant needed supervision to wash or bathe”.

In line with the above if the tribunal considered that (the appellant) did not have control of his seizures when awarding points in respect of the aforementioned activities, why did it not apply this logic in respect of planning and following journeys? (The appellant) stated he could recall no incidents when out walking with his wife or that she had to intervene, however if he had no warning of such seizures and had no control over them, the possibility cannot be ignored that he was at risk of harm when crossing the road. Consequently, it is my contention the tribunal has applied inadequate reasoning in respect of mobility activity 1 thereby rendering its decision erroneous in law.’

Analysis

19. In *AG-v-Department for Communities (PIP)* ([2018] NICom 51, C2/18-19(PIP)), I said the following, at paragraphs 18 to 19:

‘18. The decision in *RJ* is a decision of a Three-Judge Panel of the Upper Tribunal. It has been reported in the reported decisions of the Administrative Appeals Chamber of the Upper Tribunal. I agree with the careful and detailed analysis undertaken by the Three-Judge Panel including the acceptance of the further analysis undertaken by the different Three-Judge Panel in *MH*. I accept that the principles are equally applicable to the equivalent legislative provisions in Northern Ireland i.e. regulations 4(3), 4(5) and 7 of the 2016 Regulations and how those provisions apply to Schedule 1 to the 2016 Regulations.

19. Applying the principles in *RJ* and *MH* to the instant case, it is clear that the decision of the appeal tribunal is in error in how it has applied regulations 4(3) and (5) and 7 of the 2016 Regulations. In that regard I am in agreement with the submissions made by both Mr Black and Mr Hinton.’

20. I have reached the same conclusions in the instant case and, on that basis, set aside the decision of the appeal tribunal as being in error of law. I do so with a degree of reluctance given the appeal tribunal’s careful and judicious management of the other aspects of the appeal, and its otherwise circumspectly prepared statement of reasons.

Disposal

21. The decision of the appeal tribunal dated 29 May 2018 is in error of law. Pursuant to the powers conferred on me by Article 15(8) of the Social Security (Northern Ireland) Order 1998, I set aside the decision appealed against.

22. 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 21 July 2017, which decided that the appellant was not entitled to PIP from and including 31 March 2017;

(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. The appeal tribunal is directed to take any

evidence of subsequent claims to PIP into account in line with the principles set out in *C20/04-05(DLA)*;

(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.

(signed): K Mullan

Chief Commissioner

4 November 2019