

**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 12 April 2018

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Lurgan.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I direct that the appeal shall be determined by a newly constituted tribunal.
3. The practical effect of this decision is that the appellant no longer satisfies the conditions of entitlement to the daily living component of Personal Independence Payment (PIP) from and including 27 September 2017.

**REASONS**

**Background**

4. The appellant had been awarded disability living allowance (DLA) from 25 January 1999 at various rates for various fixed periods. Her most recent award was made at the high rate of the care component and the high rate of the mobility component from 13 April 2011. Her existing DLA award was due to expire on 26 September 2017 and she was invited to claim PIP by the Department for Communities (the Department) from 6 June 2017. She submitted a claim on the basis of needs arising from anaphylactic shock, chronic depression, an erratic sleeping pattern, chronic asthma, chronic sciatica, arthritis, a tear in her rotator cuff tendon, bowel incontinence and photo-contact dermatitis on her hands and wrists. A copy of a factual report

from the appellant's general practitioner (GP) relating to the immediately previous DLA claim was obtained. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 10 July 2017. She was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 15 August 2017. On 25 August 2017 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 6 June 2017. The appellant requested a reconsideration of the decision, and she was notified that the decision had been reconsidered by the Department but not revised. She appealed.

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 12 April 2018 the tribunal allowed the appeal in respect of the daily living component, awarding the standard rate for an indefinite period from and including 27 September 2017, but it disallowed the appeal in respect of the mobility component. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 28 August 2018. 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 25 October 2018. On 14 November 2018 the appellant applied to a Social Security Commissioner for leave to appeal.

### **Grounds**

6. The appellant, represented by Mr Black of Law Centre (NI), submitted that the tribunal had erred in law on the basis that its reasons for not awarding the mobility component were inadequate in the light of the previous DLA mobility component award. He further submitted that the tribunal had erred by failing to give reasons for not awarding points under activity 3 of the daily living activities.
7. The Department was invited to make observations on the appellant's grounds. Mr Hinton of Decision Making Services (DMS) responded on behalf of the Department. Mr Hinton submitted that the tribunal had erred in law as alleged and indicated that the Department supported the application. The basis of his support was the tribunal's approach to the issue of the "reasonable time period" aspect of mobilising and whether the use of an aid had been explored sufficiently in relation to managing medication.

### **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 questionnaire completed by the appellant, a GP factual report relating to DLA and a consultation report from the HCP. It further had sight of the appellant's GP notes and records, a written submission from the appellant's representative with accompanying documents and a letter from Mr McLaughlin, a trauma therapist. The appellant attended the hearing and gave oral evidence, accompanied by Mr McLaughlin, who also gave oral evidence. She was represented by Ms Coulter of Law Centre NI. The

appellant stated that she had physical problems walking due to foot problems, had rotator cuff problems, had undergone radiotherapy and surgical treatment for cancer in 2011 with subsequent bowel problems, and suffered from depression.

9. The tribunal noted that the appellant had no recent treatment for rotator cuff problems, yet accepted that she used a tilting frame for a kettle. It awarded 2 points for descriptor 1(b). It accepted that the appellant experienced bouts of depression that might give rise to a need for prompting to take food for 2/3 days in a month, but found that this was insufficient to award points under activity 2. It found that the appellant could manage medication unaided, awarding no points for activity 3. It accepted that the appellant needed an aid to use a shower, awarding 2 points for activity 4. The tribunal further found that she needed to use an aid to manage incontinence, awarding 2 points for activity 5. The tribunal did not accept that limitations in the right rotator cuff were as restricting as stated by the appellant in view of the lack of recent mention in medical records. It noted that motivation problems were not present for the majority of the time, awarding no points for activity 6. The tribunal accepted that the appellant had difficulties with engaging with other people and awarded 4 points for activity 9(c). It awarded daily living component at the standard rate for an indefinite period.
10. The appellant told the tribunal that she needed to be accompanied when undertaking an unfamiliar journey due to anxiety, but told the HCP that she could drive to familiar places and take taxis to unfamiliar places. She indicated that she could follow the route of an unfamiliar journey hypothetically. The tribunal awarded no points for mobility activity 1. The tribunal accepted that the appellant had foot pain and used a stick. It found that she could walk for 5 minutes on her own evidence and concluded that she could walk between 50-200 metres using the stick as an aid. It decided to award 4 points for activity 2(b). It disallowed the mobility component therefore.

### **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. Regulation 4 is an important provision which sets parameters within which the assessment of daily living and mobility activities is to be carried out. It provides:

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;

## Hearing

14. I held an oral hearing of the application. Mr Black of Law Centre NI appeared for the appellant. Mr Arthurs appeared for the Department. At the outset of the hearing I granted leave to appeal and the parties consented to me proceeding to treat the application as an appeal.

15. Mr Black relied upon his previous written submissions and advanced three grounds. Firstly, he submitted that the tribunal erred by failing to give reasons as to why it had not awarded any mobility element, despite the fact that the appellant had been in receipt of DLA mobility component for a number of years. In support of this ground he relied upon the decision of Upper Tribunal Judge Wright in *AW v Secretary of State for Work and Pensions* [2018] UKUT 76. At hearing, he further introduced reliance upon the decision of Deputy Commissioner Wikeley in *DC v Department for Communities* [2019] NI Com 24.
16. Mr Black's submission was that the appellant suffered from a degenerative condition and that some evidence of improvement would be expected to explain the removal of an award based on mobility. However, I pointed out that the evidence in 2011, when the DLA mobility award was made, indicated reduced mobility due to osteoarthritis but also due to recent cancer surgery, from which some improvement might be expected. Mr Black conceded that he had not seen the evidence that was before the tribunal but he submitted that the tribunal needed to address this in their reasons, yet had not. He submitted that the evidence which grounded the previous DLA award needed to be before the tribunal, on the basis of *AW v SSWP*, and also needed to be considered in the tribunal's reasoning, on the basis of *DC v DfC*.
17. In his further grounds, Mr Black submitted that the tribunal has failed to explain why it did not award points in respect of activity 3 on the basis that the appellant used an aid to push tablets out of their packaging. He further submitted that the tribunal had erred by failing to explain why it had not awarded additional points in respect of activity 4 on the basis that the appellant must continue to have rotator cuff problems. He submitted that the tribunal had not dealt with the appellant's statement that she needed help with washing from her sister.
18. In the written submissions, Mr Hinton for the Department had agreed with Mr Black's submissions on the first ground. He also agreed with his submissions on the second ground. However, he did not accept that the tribunal had erred in relation to the third ground. At hearing, Mr Arthurs adopted Mr Hinton's observations.
19. Mr Arthurs noted that the practice of the Department in PIP appeals was to include the past evidence on which DLA was previously awarded, such as a GP factual report, in the submission to the tribunal. He referred to *CH & KN v Secretary of State for Work and Pensions* [2018] UKUT 330. He indicated that the Department would accept the conclusions of Upper Tribunal Judge Marcus at paragraphs 62-66 in *CH & KN* as to when a tribunal should have previous DLA evidence before it. He submitted however, that there could be cases where the PIP evidence was sufficiently clear as to render it unnecessary to examine the basis of a previous DLA award.
20. As far as *DC v DfC* was concerned, Mr Arthurs submitted that the particular case was decided on the fact that the tribunal considering PIP mobility component had misunderstood the basis of the previous DLA award, based as it was on manner of walking rather than distance.

21. He submitted that tribunal erred by not dealing with the appellant's evidence that she needed to use an implement to get medication out of packet. It found that she had no problem with this activity. However, he acknowledged that this concerned 1 point only and therefore may not materially affect the outcome of the appeal.
22. On washing and bathing Mr Arthurs submitted that there was no recent evidence of shoulder problems before the tribunal. He referred to paragraph 63 of *CH & KN* and submitted that the tribunal had given a satisfactory explanation. This explanation was that there was no contemporaneous evidence of problems with shoulder and on that basis it could rationally have found that the appellant didn't need help.

### **Assessment**

23. Two cases were relied upon in argument by the appellant. The first of these was the decision of Upper Tribunal Judge Wright in *AW v SSWP*. That case concerned similar circumstances to the present one, where a claimant had a previous award of DLA high rate mobility component. The tribunal found that the appellant in that case did not satisfy descriptor 2.c of the PIP mobility activities. Judge Wright held that the tribunal was in error of law for not providing sufficient findings of fact and reasons for that decision. An important context was that the evidence relating to the previous DLA award was not placed before the tribunal. The Secretary of State accepted that the DLA evidence might be relevant and that, as the particular appellant had a degenerative condition, an improvement in his condition would not be expected. Judge Wright found that there were failures on the tribunal's part to address aspects of the evidence on mobility that was before it, but also failures with regard to the material not before it.
24. The second case relied upon was the decision of Deputy Commissioner Wikeley in *DC v DfC*. A ground advanced in that case was that there was inadequate explanation of how the appellant had been in receipt of DLA at the high rate of the mobility component, but was only awarded 4 points under descriptor 2.b of the PIP mobility activities. The tribunal had the EMP report from the previous DLA award before it. This indicated a fairly lengthy walking distance, but indicated significant problems with the manner of walking due to the claimant suffering late effects of polio. Having addressed *R(M)1/96*, *YM v SSWP* [2018] UKUT 16 and *CH & KN v SSWP* [2018] UKUT 303, Deputy Commissioner Wikeley found that the tribunal had not made reference to relevant findings in the EMP report and had thereby failed to explain its decision adequately.
25. Mr Black's principal submission was that the tribunal has not explained its decision on the mobility component sufficiently in the light of the past decision awarding DLA high rate mobility component. He relied, inter alia, on the decision of Upper Tribunal Judge Wright in *AW v SSWP*, who referred in turn to the decision of the Court of Appeal in England and Wales in the judicial review appeal of *R(Sumpter) v Secretary of State for Work and Pensions* [2015] EWCA Civ 103. Mr Black submitted that this decision inferred a rule of thumb that the

appellant's walking distance without severe discomfort was limited to 50 metres. He submitted that this would equate to descriptor 2.c or 2.d and lead to a higher award of points than the 4 for descriptor 2.b that the tribunal actually awarded.

26. *Sumpter* was a judicial review addressed to the lawfulness of the 2013 Great Britain equivalent of the 2016 Regulations, and in particular the consultation process that took place in Great Britain before their introduction, with particular reference to the thresholds for entitlement to the mobility component. The details of the case are not directly of relevance. However, in *Sumpter* in the EWCA, McCombe LJ said at paragraph 4:

“... The higher rate was awarded to those who were “virtually unable to walk” and it had come to be accepted (as we were informed by counsel, as a result of decisions before the Commissioners and later in the Tribunals) that a claimant would usually satisfy this test if he or she was unable to walk more than 50 metres...”

McCombe LJ further said at paragraph 6 that:

“... the criteria for payment of the enhanced rate impose a threshold condition that the claimant cannot walk more than 20 metres, rather than the 50 metre “rule of thumb” that had become the norm under DLA. While that “rule” was not (as such) statutory, it had become the understanding or lore in the field that 50 metres was the qualifying criterion”.

27. I am not bound by the EWCA. However, I would normally consider the decision of the EWCA highly persuasive to the extent that I should follow it, in accordance with the principle in *Carleton v DHSS* [1988] 11 NIJB 57. Nevertheless, whether or not the above statement reflects the position in England and Wales accurately, I consider that it does not accurately reflect the position in Northern Ireland, based on my experience as a Commissioner for 8 years and as a tribunal legal member for 9 years before that. I observe the comments of Upper Tribunal Judge Ward at paragraph 13 of *YM v Secretary of State for Work and Pensions* [2016] UKUT 16 and of Upper Tribunal Judge Marcus at paragraph 13 of *CH and KN v Secretary of State for Work and Pensions* [2018] UKUT 330 and conclude that this may well have been an established practice in Great Britain. However, what was said in *Sumpter* and the Upper Tribunal cases was based on evidence relating to Great Britain. I respectfully distinguish this from the position in Northern Ireland.
28. Under regulation 12 of the Social Security (Disability Living Allowance) Regulations (NI) 1992, it might have been open to a tribunal to have found that someone who could not walk more than 50 metres was virtually unable to walk. However, the relevant jurisprudence emphasises that the factor of distance in addressing virtual inability to walk is only one factor among four (speed, time and manner of walking being the others).

29. What is meant by “virtually unable to walk” is a question of law. Therefore, Commissioners have avoided laying down distance benchmarks that do not appear in the legislation. They have dealt with challenges to tribunals decisions on the basis that they go beyond the boundaries of reasonable decision making. Thus, in R(M)1/78 it was held that no persons acting judicially and properly instructed as to the relevant law could have found that a child with epilepsy and cerebral palsy who could walk a mile was virtually unable to walk, overturning the tribunal’s decision. At the other end of the spectrum, in R(M)1/91 a tribunal decision that declined to accept that a walking limitation of 100 yards represented virtual inability to walk revealed no error of law. I agree with Commissioner who held in CDLA/717/98 that:

“it is not for a Commissioner to attempt to lay down a precise formula for determining whether or not a claimant is unable to walk when the legislation does not do so. The legislation allows adjudication officers and tribunals a margin of appreciation”.

30. I am aware that the Northern Ireland Commissioners have tested this principle. For example, Mrs Commissioner Brown in C20/05-06(DLA) was to some extent prescriptive when she said:

16. In the present case, as regards the mobility component, the instant tribunal’s finding was of a walking ability of at least [my emphasis] 100 yards before the onset of severe discomfort. As I indicated above 100 yards is a walking distance (assuming reasonable factors of speed, manner and time of walking) which would entitle a tribunal to conclude that a claimant was not virtually unable to walk. It is unlikely that this amount of walking ability could reasonably be considered as virtual inability to walk though it must be remembered that Parliament has not seen fit to prescribe actual distances, times etc. which can or cannot qualify as being virtually unable to walk. However (R(M)1/91) the baseline is total inability to walk which is extended to take in people who can technically walk but only to an insignificant extent. Therefore, it is only very, very severe walking restrictions which will qualify as virtual inability to walk. I do not think that the above-mentioned walking ability could be so considered and it is unlikely that a tribunal would consider such walking ability to be virtual inability to walk.

31. I am also aware of one Northern Ireland Commissioner’s decision having referred to a tribunal applying a 50 metre rule of thumb. In that decision Chief Commissioner Mullan did not need to consider the lawfulness of that approach (see paragraph 16 of the in *LL v Department for Communities* [2017] NI Com 51). However, while at least one tribunal in Northern Ireland has applied a rule of thumb in DLA mobility appeals, it seems clear to me that tribunals generally should not follow such an approach for the distance factor of DLA mobility component.



32. If a decision of a tribunal deciding a DLA high rate mobility component appeal came before me and it appeared that the tribunal was applying a “50 metre rule”, I would be likely to hold its decision erroneous in law on the basis that it was fettering its own discretion and failing to address all relevant factors. For these reasons, it appears to me incorrect to link, as the EWCA has done, the fairly precisely prescribed mobility conditions of PIP to those of the DLA mobility component, which permit a much greater margin of appreciation.
33. Mr Black has relied upon the decision of Deputy Commissioner Wikeley in *DC v Department for Communities* [2019] NI Com 24. I agree with Deputy Commissioner Wikeley’s decision in so far as he held that there was no rule of law that necessarily requires a different outcome to be explained as between a DLA claim and a PIP claim, but that it was for the tribunal in the particular circumstances of each case to decide if there was such an apparent inconsistency that reasons were required. However, I also qualify this with reference to the decision of Great Britain Commissioner Howell in R(M)1/96 concerning the adequacy of reasons. That decision was confined to the requirement to give reasons for DLA renewal decisions which did not maintain the level of a previous award. Commissioner Howell held that that reasons were not required where it is obvious from the findings of the tribunal why it is not renewing a previous award.
34. From the above discussion, it follows that I do not accept the proposition that, in cases where claimants previously enjoyed an award of DLA high rate mobility component, there is a heightened requirement on tribunals generally to give reasons for not finding that descriptors 2(c)-(f) are satisfied. The conditions of entitlement to PIP mobility component do not neatly equate to the DLA conditions of entitlement. Many claimants who would previously have been awarded DLA at the rate of the high rate mobility component will be excluded from the equivalent PIP rate simply because the conditions of entitlement are different.
35. The tribunal in this case had before it some of the evidence that led to the previous DLA mobility award. The GP factual report of 26 May 2011 referred to the reduced mobility of the appellant due to osteoarthritis, low back pain and recent surgery. The evidence shows that surgery, following a diagnosis of endometrial cancer, had taken place in April 2011. Whereas osteoarthritis and low back pain were and remain existing conditions, the award of high rate mobility from 13 April 2011 would appear to have a direct connection to this surgery. It is not unreasonable to surmise that the high rate mobility component of DLA was awarded on the basis of the GP factual report. Mr Black had submitted that the appellant suffered from degenerative conditions from which no improvement was likely. However, it is clear that the previous award was based on three overlapping conditions - osteoarthritis, low back pain and recent surgery - and that improvement would be expected from one of these, namely the cancer surgery. It does not seem to me that this is a case in which there is such an inconsistency with a previous decision as to demand explanation.
36. The tribunal’s stated reasons in the present case focus on the appellant’s own evidence, in which she indicated an ability to walk for 5 minutes, using a stick,

and depending on her asthma. I observe that the appellant indicated that she would be slowly paced. The tribunal extrapolated from the evidence of the duration of her walking that the appellant could stand and then move between 50-200 metres using the stick as an aid, awarding 4 points for mobility activity 2(b).

37. In order to have awarded a higher level of points, the tribunal would have needed to find evidence that the appellant could not stand and then move more than 50 metres either aided or unaided. This was the level of restriction claimed by the appellant in her PIP2 questionnaire. However, the appellant did not state any limitation on distance – but rather time - to the tribunal in her oral evidence.
38. It seems to me that there is some force in the criticism levelled by the Department on the issue of “reasonable time period”. It seems to me that the tribunal did not fully explain the basis of its finding that the appellant could stand and then move between 50-200 metres using the stick as an aid. It did not make a formal finding on distance, as the appellant avoided answering the question directed to her. However, it appeared to make a formal finding on duration of walking, namely 5 minutes.
39. While there will be variation from person to person, an adult with no restriction on walking ability could expect to walk a mile in around 20 minutes at a normal walking pace. This would equate to around 400 metres in 5 minutes. The tribunal found that the appellant could walk between 50-200 metres using a stick as an aid, by implication in the 5 minutes stated in evidence. It appears to me that there is a problem with the tribunal’s approach, however.
40. Someone who walked between 50-200 metres in 5 minutes would be walking at less than half of normal walking pace. By regulation 4(3)(d) of the 2016 Regulations a claimant is to be assessed as satisfying a descriptor only if he or she can do so within a reasonable time period. By regulation 4(5):

“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.
41. The clear implication of an ability to walk only 50-200 metres in 5 minutes is that walking is performed at less than half of normal walking pace. This would mean that the activity in descriptor 2(b) is not satisfied for the reason that regulation 4(3)(d) applies.
42. As a consequence, I consider that it was not open to the tribunal to make the finding that descriptor 2(b) applied and that it has erred in law accordingly. Therefore, I must allow the appeal and set aside the decision of the appeal tribunal.
43. I suspect that the tribunal wished to place the appellant into a particular descriptor on the basis of its general assessment of her overall condition. However, it lacked formal evidence to place her within the 50-200 metres

descriptor. The appellant herself had claimed a maximum of 50 metres whereas the HCP had assessed her as able to mobilise more than 200 metres. No specific walking distance was adduced in evidence and there was no specific finding by the tribunal to reject the appellant's own claim that she could walk for 5 minutes. I cannot therefore substitute my own decision on the basis of the tribunal's findings. Consequently, I must remit the appeal to a newly constituted tribunal for determination.

44. As a result of this conclusion, I do not need to consider the other grounds submitted on the appellant's behalf and will not do so.
45. The decision to set aside the decision of the appeal tribunal has the effect that the appellant no longer satisfies the conditions of entitlement to PIP from and including 27 September 2017. However, she will be able to present her case for both daily living and mobility components to the new tribunal.

(signed): Odhrán Stockman

Commissioner

12 November 2019