

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 5 March 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 5 March 2019 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) remains to be determined by another appeal tribunal. In accordance with the guidance set out below,

the newly constituted appeal tribunal will be undertaking its own determination of the legal and factual issues which arise in the appeal.

Background

5. On 12 September 2017 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 13 June 2017. Following a request to that effect the decision dated 12 September 2017 was reconsidered on 11 October 2017 but was not changed. An appeal against the decision dated 12 September 2017 was received in the Department on 1 November 2017.
6. Following an earlier adjournment, the substantive appeal tribunal hearing took place on 5 March 2019. The appellant was not present. The record of proceedings for the appeal tribunal hearing noted the following:

'Clerk to the Tribunal

(The appellant) replied to TAS on 1 March to say that he would attend the 11 AM hearing today.

Now 11.20 – he has not attended, nor phoned.

Tribunal

Decided to proceed. Noted that (the appellant) had not attended the previous hearing on 16 February 2018 and that that hearing had been adjourned to give (the appellant) a further opportunity to attend.'

7. There was no Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the Departmental decision of 12 September 2017.
8. On 6 June 2019 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). On 8 July 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

9. On 29 July 2019 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 16 August 2019 observations on the application were requested from Decision Making Services (DMS). In written observations dated 29 August 2019, Ms Patterson, for DMS, opposed the application for leave to appeal on the grounds advanced by the appellant but supported the application on another identified ground. The written observations were shared with the

appellant on 29 August 2019. There has been no further communication from the appellant.

10. On 12 November 2019 I granted leave to appeal. When granting leave to appeal I gave as a reason that it was arguable that the appeal tribunal's reasons were inadequate to explain its decision in connection with an issue arising in the appeal. 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.”

The error of law in the instant appeal

13. In her written observations on the application for leave to appeal, Ms Patterson made the following submission:

'The Tribunal addressed the disputed activities. These were Food Preparation, Taking Nutrition, Managing Therapy, Washing / Bathing, Managing Toilet Needs, Engaging with other people face to face, and also made reference to the undisputed daily living activities. It similarly addressed both disputed activities of the mobility component of PIP – Planning and Following Journeys, and Moving Around.

Having perused the Statement of Reasons, I would be concerned that the Tribunal has given insufficient reasons for its decision.

For example, the Tribunal's treatment of the activity 'Planning and following journeys':

'(The appellant) in the PIP2 form reported that anxiety affected his ability to go somewhere different. He reported to the [Disability Assessor] that he had never learned to drive and relied on walking, buses and taxis. He has no diagnosed cognitive impairment.

The Tribunal awards Descriptor (a) – He is able to plan and follow the route of a journey unaided = 0 points.'

The Tribunal has simply recited evidence and indicated how many points are awarded, but has not shown that it has considered any higher scoring descriptors nor that it has subjected the evidence to analysis and reasoning. A similar approach is taken in all disputed activities.

In SC-v-SSWP (PIP) [2017] UKUT 0317 (AAC), Judge Gray states at paragraph 20:

"A recitation of the evidence followed by an indication of how many points are awarded is neither a finding of fact nor a reason for the conclusion arrived at. A finding of fact can only result from subjecting the evidence to analysis and reasoning; it is not sufficient to set out the evidence and say that having

considered it the tribunal was satisfied that the terms of a particular descriptor was met; the 'because' element is lacking. That element should explain what the tribunal accepted or rejected and why."

The reasoning the Tribunal gave for its choice of each descriptor is sparse. Although brevity does not necessarily constitute an error in law providing the reasoning is sound, covers all relevant issues raised and conflicts of opinion, it is my contention that the tribunal failed to meet any of those conditions. My conclusion is that it has failed to give any adequate reasons for findings on material matters. Consequently I believe it has erred in law.'

14. I agree with Ms Patterson's careful analysis and for the reasons which she has set out also agree that the decision of the appeal tribunal is in error of law.

Disposal

15. The decision of the appeal tribunal dated 5 March 2019 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.
16. 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 12 September 2017 in which a decision maker of the Department decided that the appellant was not entitled to PIP from and including 13 June 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

10 February 2020