

**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 24 July 2018

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. The decision of the appeal tribunal dated 24 July 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 her 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 10 November 2017 a decision maker of the Department decided that the appellant was entitled to the standard rate of the daily living component of PIP for the fixed period from 13 December 2017 to 24 October 2020 and was not entitled to the mobility component of that benefit. Following a request to that effect the decision dated 10 November 2017 was reconsidered on 29 November 2017 but was not changed. An appeal against the decision dated 10 November 2017 was received in the Department on 27 March 2018. The appeal was received outside of the prescribed time limits for making an appeal but was, nonetheless, accepted by the Department.
6. The appeal tribunal hearing took place on 24 July 2018. The appellant was present and was represented by Mr O'Hare. There was a Departmental Presenting Officer present. The appeal tribunal disallowed the appeal and confirmed the decision of 10 November 2017. On 22 March 2019 an application for leave to appeal to the Social Security Commissioner was received in the Appeals Service (TAS). The appellant was represented in the application by Mr Black of the Law Centre (Northern Ireland). On 29 March 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

### **Proceedings before the Social Security Commissioner**

7. On 5 April 2019 a further application for leave to appeal was received in the office of the Social Security Commissioners. The appellant was represented in this application by Mr Black. On 7 May 2019 observations on the application for leave to appeal were requested from Decision Making Services ('DMS'). In written observations dated 29 May 2019, Ms Patterson, for DMS, Opposed the application for leave to appeal on the ground advanced by Mr Black but supported the application on another identified ground.
8. The written observations were shared with the appellant and Mr Black on 30 May 2019. On 5 June 2019 further correspondence was received from Mr Black in which he submitted that he continued to rely on the original ground of appeal but was grateful to the Department for identifying the further error of law. He indicated his acceptance and adoption of the additional error of law as a ground of appeal. Other than that, he had no further comments to make.
9. The case became part of my workload on 9 August 2019. On 11 September 2019 I granted leave to appeal. When granting leave to appeal, I gave as a reason that it was arguable that the appeal tribunal had failed in the exercise of its inquisitorial role in respect of an issue

raised by the appeal. 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.”

### **Analysis**

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

‘Whilst it is my submission that the tribunal has not erred as contended by Mr Black, I believe that for the following reasons the tribunal has in fact erred in law.

In her PIP2 form (the appellant) stated that she can walk less than 20 metres and uses an aid to do so, and that she sometimes needs a wheelchair. She has a rollator with a seat, provided by an Occupational Therapist. She experiences pain after a few metres, her legs cramp and she needs to stop. Walking is always difficult and painful.

The Disability Assessor's report functional history includes:

*'she could walk from the house to the car or the length of the clinic corridor using her aid, she will sit for a few minutes on it if her back gets too sore, she would be able to walk on again.'*

The Disability Assessor's opinion was that (the appellant) can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided (descriptor b).

The assessor recorded the following justification for this choice of descriptor:

*'Variability reports today is a very bad day and she is at the end of a flare up, MSK and IO observed her to walk approximately 20 metres unaided and at a normal pace and gait with good standing tolerance. She is not under specialist care and she reports her pain medications are effective. There is no FME to support the significant level of reported restriction. It is likely she can reliably stand and then move more than 50 metres but no more than 200 metres aided.'*

The Tribunal's Record of Proceedings notes that, in response to questions asked by the Disability Qualified Member, (the appellant) stated:

*'She is able to move around the house. She only uses the staircase during the morning (to come down) and bed-time (to go up).'*

*'She does have difficulties getting in and out of a car. They had travelled to C yesterday. They went to a coffee shop.'*

*'She has the following aids in her house. There is a perching stool in the shower. There is a rail to help get her out of bed. There is also a rail in the downstairs toilet. All of these adaptations were put in for her husband.*

*'She does have a high seat toilet in the downstairs bathroom. This has been adapted for her. She had two falls last summer.*

The Tribunal's Statement of Reasons includes note of (the appellant's) account in her PIP2 form, as well as the Department's reasons for awarding 4 points, followed by:

*'The Tribunal concluded that the appellant was exaggerating when she stated that she had difficulty walking because she was in pain all the time. The medical evidence does not support such a severe restriction in her mobility. The social and occupational history of the healthcare assessment's report indicates that she engages in a range of leisure activities such as going to church and going out for coffee. It may well be the case that when she has a flare-up and is at her worst that she is bedbound and finds it difficult to move more than 20 metres. However, we do not find this to be the case for the majority of the days.'*

The tribunal has clearly accepted that they consider (the appellant's) condition to fluctuate in that she has good and bad days. Also, the findings regarding 'a range of leisure activities such as going to church and going out for coffee' do not in themselves indicate what distance (the appellant) would be able to move on a good day or what problems she may actually have in mobilising. In their inquisitorial role, I feel the Tribunal should have investigated further regarding how many good and bad days (the appellant) has, and what going to church or for coffee entails – does she get dropped off at the door? How far is it from the car park to her destination? Also, (the appellant) stated she had visited her daughter in London for 10 days – the tribunal could have asked her further questions regarding how she mobilised when she was there, when the trip took place, and what activities she undertook while she was there. This could have strengthened their justification of their choice of

descriptor. For all these reasons I believe the tribunal have failed in their inquisitorial role and I would consider this to be an error in law.'

13. It is axiomatic that I accept that the assessment of evidence, including the evidence of the appellant, is a matter for the appeal tribunal. In *C14/02-03(DLA)*, Commissioner Brown, at paragraph 11, stated:

'... there is no universal rule that a Tribunal must always explain its assessment of credibility. It will usually be enough for a Tribunal to say that it does not believe a witness.'

14. Additionally, in *R3-01(IB)(T)*, a Tribunal of Commissioners, at paragraph 22 repeated what the duty is:

'We do not consider that there is any universal obligation on a Tribunal to explain its assessment of credibility. We disagree with *CSIB/459/97* in that respect. There may of course be occasions when this is necessary but it is not an absolute rule that this must always be done. If a Tribunal makes clear that it does not believe a claimant's evidence or that it considers him to be exaggerating this will usually be sufficient. The Tribunal is not required to give reasons for its reasons. There may be situations when a further explanation will be required but the only standard is that the reasons should explain the decision. It will, however, normally be a sufficient explanation for rejecting an item of evidence, including evidence of a party to an appeal, to say that the witness is not believed or is exaggerating.'

15. This reasoning was confirmed in *CIS/4022/2007*. After analysing a series of authorities on the issue of the assessment of credibility, including *R3-01(IB)(T)*, the Deputy Commissioner (as he then was) summarised, at paragraph 52, as follows:

'In my assessment the fundamental principles to be derived from these cases and to be applied by tribunals where credibility is in issue may be summarised as follows: (1) there is no formal requirement that a claimant's evidence be corroborated – but, although it is not a prerequisite, corroborative evidence may well reinforce the claimant's evidence; (2) equally, there is no obligation on a tribunal simply to accept a claimant's evidence as credible; (3) the decision on credibility is a decision for the tribunal in the exercise of its judgment, weighing and taking into account all relevant considerations (e.g. the person's reliability, the internal consistency of their account, its consistency with other

evidence, its inherent plausibility, etc, whilst bearing in mind that the bare-faced liar may appear wholly consistent and the truthful witness's account may have gaps and discrepancies, not least due to forgetfulness or mental health problems); (4) subject to the requirements of natural justice, there is no obligation on a tribunal to put a finding as to credibility to a party for comment before reaching a decision; (5) having arrived at its decision, there is no universal obligation on tribunals to explain assessments of credibility in every instance; (6) there is, however, an obligation on a tribunal to give adequate reasons for its decision, which may, depending on the circumstances, include a brief explanation as to why a particular piece of evidence has not been accepted. As the Northern Ireland Tribunal of Commissioners explained in R 3/01(IB)(T), ultimately "the only rule is that the reasons for the decision must make the decision comprehensible to a reasonable person reading it".

16. It is equally clear that an appeal on a question of law should not be permitted to become a re-hearing or further assessment of the evidence, when that assessment has already been fully and thoroughly undertaken. In the instant case, and for the reasons which have been set out in Ms Patterson's careful analysis, I am of the view that the appeal tribunal's assessment of the appellant's evidence on the certain key issues was insufficiently rigorous and that aspects of what the appellant told the appeal tribunal required further investigation. For that reason, I am satisfied that the decision of the appeal tribunal is in error of law.
17. I am not required, therefore, to explore the other ground of appeal which has been advanced on behalf of the appellant. I would not, however, have found the decision of the appeal tribunal to be in error of law on the basis of that additional ground.

### **Disposal**

18. The decision of the appeal tribunal dated 24 July 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.
19. 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 10 November 2017 in which a decision maker of the Department decided that the appellant was entitled to the standard rate of the daily living component of PIP for the fixed period from 13 December 2017 to 24 October 2020 and was not entitled to the mobility component of that benefit;

- (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) the appeal tribunal to which the appeal is being referred should note that the decision of the appeal tribunal which I have set aside made an award of entitlement to the standard rate of the daily living component of PIP from 13 December 2017 to 24 October 2020. The period of that award remains extant and the award itself remains relevant in that if the newly constituted appeal tribunal to which the appeal is being referred makes a further positive decision on entitlement to the daily living or mobility components, any such award must be deemed to be on account of the award already made;
- (iv) 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
- (v) 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

15 April 2020