

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 6 November 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference LD/4759/17/02/D.
2. An oral hearing of the application was initially requested. However, the appellant subsequently indicated that he did not want an oral hearing and I consider that the proceedings can properly be determined without an oral hearing.
3. For the reasons I give below, I grant leave to appeal. I allow the appeal. I decide the appeal myself under Article 15(8)(8) of the Social Security (NI) Order 1998. I decide that the appellant satisfied the conditions of entitlement to the daily living component of PIP at the standard rate from 22 June 2016 to 14 November 2017 inclusive.

REASONS

Background

4. The appellant claimed personal independence payment (PIP) by telephone from the Department for Communities (the Department) from 22 June 2016. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 15 January 2017. He was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 30 January 2017. On 14 February 2017 the

Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 22 June 2016. The appellant requested a reconsideration of the decision, and he was notified that the decision had been reconsidered by the Department but not revised. He 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 6 November 2017, the tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 9 March 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 30 April 2018. On 18 June 2018 the appellant applied to a Social Security Commissioner for leave to appeal. The application was late. However, the late application was admitted out of time for special reasons by the Chief Social Security Commissioner on 16 January 2019.
6. The appellant requested permission to submit further material in support of his application. He was given permission to do so by the Legal Officer to the Commissioners and made extensive further submissions over a number of months. Consideration of the file was delayed for that reason. Over the course of 2019, eight substantive e-mails were received, and three bundles of documents, augmenting the appellant's grounds. The file was first passed to a Commissioner for determination in November 2019. At that stage it appeared that issues arising in a case before the Tribunal of Commissioners in *SA v Department for Communities* [2020] NI Com 38 might be relevant to the appellant's case, and his case was delayed pending the outcome in that other case. I apologise to the appellant for the resulting delay in determining his application.
7. I also observe from the submitted materials that the appellant has been awarded PIP from 15 November 2017. He had made a successful fresh claim to PIP subsequent to the tribunal decision that he challenges in these proceedings. A fresh award of benefit has the effect of "closing" the period over which I have jurisdiction from the date of that new award. This means that the present application relates only to the past period from 22 June 2016 to 14 November 2017.

Grounds

8. The appellant principally submits that the tribunal has erred in law on the basis that:
 - (i) it asked him about his day to day functioning rather than his mental health problems;
 - (ii) it considered a report from a physiotherapist who was not a mental health specialist;

(iii) it failed in its duty of care.

9. As indicated above, the appellant confirmed that he had been awarded the daily living component of PIP on a new claim from 15 November 2017. However, he further sought to challenge the part of this later decision which refused mobility component on the basis that “a High Court ruling” in January 2018 was relevant. I understand this to be a reference to *RF and others v Secretary of State for Work and Pensions* [2017] EWHC 3375 – a decision of the Administrative Court in England and Wales given on 21 December 2017 on a judicial review.
10. The Department was invited to make observations on the appellant’s principal grounds. Mr Hinton of Decision Making Services (DMS) responded on behalf of the Department. Mr Hinton submitted that the tribunal had not erred in law as alleged and indicated that the Department did not support the application.

The tribunal’s decision

11. 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, some medical appointment letters submitted by him, a supplementary medical report in response and a consultation report from the HCP. The tribunal had sight of the appellant’s medical records, and a letter from his general practitioner (GP) setting out a list of the medication prescribed to him. The appellant attended the hearing and gave oral evidence, accompanied by his sister and represented by Mr O’Donnell. The Department was represented by Ms Laverty.
12. Mr O’Donnell indicated that the disputed activities were daily living activity 1 (Preparing food), 2 (Taking nutrition), 3 (Managing therapy), 4 (Washing and bathing), 5 (Managing toilet needs), 6 (Dressing and undressing) and 9 (Engaging with other people) and mobility activity 1 (Planning and following a journey). The functional needs were based on the appellant’s mental health only. The tribunal accepted that the appellant suffered with depression, anxiety and post-traumatic stress disorder and accepted that there appeared to have been a deterioration in his condition in August 2016, when the appellant had been hospitalised in intensive care following an overdose of alcohol and medication. The tribunal accepted that he required prompting to prepare food, supervision to manage medication and supervision or prompting to wash and bathe, awarding 5 points. It did not accept that he should be awarded points in relation to taking nutrition, managing toilet needs, dressing/undressing or engaging with other people. It did not accept that he could not plan and follow a journey. As the number of points awarded did not reach the lowest relevant threshold of 8, the appeal was disallowed.

Relevant legislation

13. 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 PIP Regulations) set out the detailed requirements for satisfying the above conditions.
14. 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.
15. The nature of the assessment is qualified, *inter alia*, by regulation 4, which 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 which C normally wears or uses; or
 - (b) as if C were wearing or using any 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;

“repeatedly” means as often as the activity being assessed is reasonably required to be completed; and

“safely” means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity.

Submissions

The appellant’s grounds and the Department’s response

16. The appellant firstly submitted that the tribunal’s decision was wrong because it seemed more interested in whether he could make a cup of tea than whether he had suicidal ideation or other critical health related issues.
17. He secondly submitted that unqualified people were carrying out the assessment in his case and specifically that the HCP was a physiotherapist by profession, and that his report was in breach of the Codes of Practice for Physiotherapists.
18. He thirdly submitted that the tribunal owed him a duty of care and failed in that duty, on the basis that the assessment and appeal process was “traumatic from start to finish”.
19. Mr Hinton responded on behalf of the Department. His response dealt with the grounds raised before me, but also refers to grounds raised with the LQM. As the grounds raised with the LQM are not before me, either procedurally or actually, I will confine my note of his response to the grounds made in the application to the Commissioner.
20. Mr Hinton noted the appellant’s submission that the Disability Assessor (his term for what I have called the healthcare professional and what is

referred to in legislation as "a person approved by the Department") did not focus on the major issues affecting his health. However, he observed that pages 3 to 7 of his report contained in some detail a history of the appellant's medical conditions and that this included details of his mental health problems. Mr Hinton submitted that the appellant's current medication and treatment were set out in detail concerning both his physical and mental health. It was recognised that his primary condition was depression/anxiety/post-traumatic stress disorder. He submitted that the report set out the appellant's account of how his mental health affected his ability to undertake the various activities. He noted that the Disability Assessor recorded detailed observations, where the appellant's mental state was referred to in some detail. He contended that the Disability Assessor focussed on the major issues affecting the appellant's health with strong emphasis on his mental condition.

21. On the second issue, Mr Hinton submitted that Health Professionals are specially trained to assess and evaluate the impact of disability on a claimant's ability to carry out any activity of daily living and mobility and would have appropriate knowledge of a wide range of medical conditions and are skilled in assessing people with physical and mental conditions.
22. He referred to a reported NI Tribunal of Commissioners decision (*R2/04(IB)(T)*) that dealt with the issue of examining medical doctors approved by the Department having expertise in a particular field or fields of medicine. This decision involved an Examining Medical Practitioner (EMP) carrying out an examination in connection with a personal capability assessment for Incapacity Benefit. Mr Hinton noted that, at paragraphs 13 and 14 of this decision the Commissioners held:

"...The EMP who carries out an examination in connection with personal capability assessment is not carrying out a course of treatment and does not require the specialist knowledge that would be necessary if that was what he or she was doing. Regulation 8 of the Social Security (Incapacity for Work) (General) Regulations 1995 provides that where it falls to be determined whether a person is capable of work, he may be called by or on behalf of a doctor approved by the Department to attend for a medical examination. The Regulations go on to provide that that examination, in the case of someone like the claimant, is directed towards the personal capability assessment.

All that is required is that the examining doctor has been approved by the Department. So long as he or she has been approved then that is enough. He or she does not have to be versed in a speciality which deals with the problems a particular person suffers from. It must be remembered that the EMP's function is not that of treating

the claimant. It is merely to examine in connection with a relatively simple test, something which EMP's have been trained to do. We have already quoted the claimant as saying that the test is fundamentally flawed. The test has had its critics but a Tribunal is not concerned with such criticisms. This is because Parliament has prescribed the test as a basis for determining capacity for work and all concerned are required to apply it whatever its defects. We add that it would, in practice, be impossible to ensure that those who are examined in connection with the test are examined by appropriately qualified specialists. There simply is not the specialist medical manpower available. Furthermore, it would, in an extremely high proportion of cases, mean that the examination would have to be conducted by two or more specialists. Many people who undergo assessment have multiple problems. For example, in many cases both the physical and the mental descriptors have to be addressed. Further, as we have sought to demonstrate, all doctors have had a general training and are constantly exposed to widely differing medical problems and conditions. Finally, the claimant asserts that he would have achieved a higher score if he had been examined by a psychiatrist. We do not think that this necessarily follows and therefore do not share his certainty".

23. Mr Hinton contended that the principles formulated can be applied to the appellant's circumstances. He reiterated that the Disability Assessor's report does not take the form of a detailed medical examination – it is a face to face consultation with the claimant to obtain information for the purposes of completing a statutory test to determine entitlement to benefit, He referred to an unreported NI Commissioner's decision *C12/03-04(DLA)* where, at paragraph 34, Commissioner Brown stated:

"...As regards Mr C...’s contention that the EMP’s report should not be relied on as it was based on a brief assessment, I can see no legal merit in that argument. The tribunal is entitled to give such weight as it sees fit to the evidence. In any event the overall assessment took ½ hour, a history was taken and signed, an examination was carried out and observations made. Mere briefness is not of itself a ground for rejecting the report but the report and assessment time overall does not in any way appear brief. Doctors will observe throughout the time spent with a patient and a test can be relevant to more than one bodily function so that it is often not possible to separate an assessment into what is relevant to mobility and what to care..."

24. In respect of the appellant's comments about the stressful nature of the tribunal proceedings, Mr Hinton observed that, as the appellant was represented, he would anticipate that his representative would have informed him what to expect when he entered the hearing room. If he felt unwell either before or during the hearing he would have expected this fact to have been recorded in the tribunal papers and for the tribunal to have offered the option of an adjournment. However, Mr Hinton saw no record of either the appellant or his representative seeking an adjournment due to him feeling unwell. On perusing the record of proceedings Mr Hinton submitted that on being questioned by the panel members the appellant had presented his case in an articulate and detailed manner with good recall and cognition.

Assessment

25. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
26. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
27. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.
28. The appellant submits that the tribunal procedure was unfair and has set out his case in considerable detail. I accept that he has raised arguable matters, and I grant leave to appeal on that basis.

The Commissioner's jurisdiction and the RF v SSWP point

29. I shall deal initially with the point raised by the appellant in course of the proceedings regarding the mobility component and the possible application to his appeal, and his existing PIP award, of the case of *RF*.
30. In these proceedings, the decisions that I am concerned with began with the claim made on 22 June 2016. Following the evidence gathering exercise that included the HCP assessment, this resulted in the Department's decision of 14 February 2017. This in turn led to the tribunal decision of 6 November 2017. Due to the date of claim and the date of the Departmental decision, the law that is relevant to the subsequent appeal tribunal decision - and my jurisdiction to supervise the tribunal for errors of law - is the law that was in force between 22 June 2016 and 14 February 2017.

31. The appellant invites me to address the decision made on his subsequent claim which was partly successful, and to address the determination in relation to the mobility component in particular. However, I consider that this request is misconceived. I have no free-standing jurisdiction to address issues arising upon the subsequent claim and the separate Departmental decision awarding PIP from November 2017. My jurisdiction is limited to an examination of the tribunal proceedings in respect of the earlier claim.
32. Moreover, even if the appellant wishes me to have regard to the Administrative Court decision in *RF v SSWP* when assessing the lawfulness of the tribunal decision of 6 November 2017, the law that the tribunal had to apply was not affected by that decision for the following reasons.
33. Mobility activity 1 was amended from 20 April 2017 by regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017. For the word “Cannot” in paragraphs (c), (d) and (f) were substituted the words “For reasons other than psychological distress, cannot”. Subsequently, in *RF*, the equivalent amendment in the Great Britain version of the Regulations was declared *ultra vires*.
34. The amendment in Northern Ireland was subsequently reversed from 15 June 2018 by regulations 2 and 3 of the Personal Independence Payment (Amendment) Regulations (NI) 2018. This returned the law in Northern Ireland to consistency with the law in Great Britain. Proceedings in another case before the Commissioners (on file *A36/19-20(PIP)*) address the period when the law was inconsistent, namely on dates from 20 April 2017 to 15 June 2018.
35. However, the present case is concerned with the law in effect between 22 June 2016 and 14 February 2017, which predates that period. Therefore, the decision in *RF* – even if arguably applying in Northern Ireland - cannot assist the present appellant. *RF* is addressed only to the form of the law that was in effect between 20 April 2017 and 15 June 2018. It therefore does not apply to the form of the law that was relevant to the present proceedings.
36. None of this affects the principal submissions made by the appellant and I will therefore move to consider the grounds originally advanced by him, as amplified with further submissions and documentary material. In total the appellant has submitted three bundles of documents. The bundles are not specifically related to the three grounds of appeal, but amplify the arguments made in relation to each.
37. The first bundle included material on appealing to the Social Security Commissioner; guidance on record keeping by the Chartered Society of Physiotherapy; an annotated copy of the healthcare professional’s report; an annotated copy of the Department’s decision; an undated mental

health social worker report; an annotated copy of the tribunal's record of proceedings and statement of reasons; an annotated copy of Mr Hinton's submission of 27 July 2018; a comment by the Royal College of Psychiatrists on a benefits legal ruling relating to PIP mobility activity 1; a DWP definition of "vulnerable claimant"; a document from a website "whatdotheyknow.com" setting out DWP guidance on additional support for vulnerable individuals; annotated extracts from the DWP PIP assessment guide relating to the needs of vulnerable "customers"; DWP guidance to providers carrying out assessments for PIP; guidance on processes to be carried out by health professionals carrying out PIP assessments; a NI Courts and Tribunals Service leaflet entitled "Social Security and Child Support Commissioners"; a decision letter awarding PIP daily living component from 15 November 2017; a copy of Upper Tribunal decision *RC v Secretary of State for Work and Pensions* [2017] UKUT 352; a document from the Health and Care Professions Council and Chartered Society of Physiotherapy setting out standards of proficiency for physiotherapists; and an article from the Chartered Society of Physiotherapists setting out a meaning for "duty of care" in practice.

38. The second bundle included number of documents. These included guidance relating to the Equality Act 2010; an abstract of an article relating to social services response to sexual abuse survivors; a list of long terms effects of childhood sexual abuse and neglect and of symptoms in adult survivors; an article on left ventricular hypertrophy; an abstract of an article from Harvard Medical School on the meaning of white spots on the brain; an article on Hippocampal volume in post-traumatic stress disorder related to childhood physical sexual abuse; an article on sexual assault and post-traumatic stress disorder; a list of PTSD symptoms from an NHS website; and two articles on Migraine.
39. The third bundle consists of a submission setting out the background facts relevant to the appellant's medical condition and the impact of the assessment procedures on him, supported by two letters from the appellant's GP dated 1 March 2019 and 6 December 2017.
40. The appellant is not represented by an experienced representative and is not legally qualified. I cannot therefore expect him to articulate his grounds as succinctly and clearly as someone who has that experience or qualification. However, he has past experience as a healthcare professional himself and he is clearly intelligent and industrious. I will try to deal with his points to the best of my understanding. My understanding of his three grounds is as follows.
41. His first ground - that the tribunal appeared more interested in whether he could make a cup of tea than if he had suicidal ideation - amounts, I believe, to a criticism of whether the tribunal's questions adequately addressed his overall health condition and elicited relevant facts. His second ground - that the HCP was a physiotherapist without training or

experience in the field of mental health – submits that the HCP was not suitably qualified to provide evidence about his mental health condition and that his evidence was unreliable. The third ground – that the assessment system failed in its duty of care to him – was premised on the failure of the HCP assessment and tribunal hearing to address his particular needs as a vulnerable person with PTSD.

First ground – adequacy of fact finding by the tribunal

42. The appellant has set out difficult and traumatising aspects of his life history in his submissions, including his sexual abuse by a member of the clergy. This appears to have had a blighting effect on his life, leading to problems in his personal lifestyle choices, employment and relationships. The applicant is also anxious to demonstrate his caring nature in his submissions, and it is clear that he is a person who is capable of putting the needs of others ahead of his own. It is also evident that he has learned to tolerate high levels of physical and emotional pain before, literally it seems, collapsing. I fully acknowledge the applicant's difficult life experiences.
43. The appellant submits that the tribunal "seemed to have more interest in whether he could make a cup of tea or not", but not in suicide attempts, suicidal ideation or other critical health related issues. As he is a former health professional, who might be expected to focus on the overall well-being of an individual, it is easy to see why this is apparently irrational to the appellant.
44. It must be remembered however, that the legal test of entitlement – set out in articles 82 to 85 of the Welfare Reform (NI) Order 2015 - is addressed to the question of whether a person's ability to carry out daily living activities, or to carry out mobility activities, is limited by the person's physical or mental condition. The PIP Regulations set out the specific criteria for whether a person's daily living or mobility activities are limited by their physical or mental condition. These range over a variety of activities, including preparing food or using the toilet. While it might appear mundane and trivial, a tribunal addressing all relevant issues can properly ask about matters such as making a cup of tea, in order to gauge, roughly, a person's physical or mental condition.
45. The tribunal noted elements of the appellant's medical history within the period of the claim that included an overdose of prescription medication and alcohol, leading to ICU admission and referral to psychosexual counselling, and also noted hospital records of issues relating to urinary frequency. It accepted that the appellant had a long history of mental health problems and suffered from anxiety and stress disorder. The appellant disputed a number of the activities. The tribunal accepted that due to mental health problems he required help with three of those, namely prompting or supervision to cook or prepare a simple meal, supervision of medication, and prompting to wash and bathe.

46. In respect of the remaining disputed activities, it did not accept on the basis of physical or mental health problems that he required encouragement to eat, that he needed assistance to use the toilet or dress/undress, and found that he could engage with others unaided. In respect of mobility, it did not accept that he could not follow the route of an unfamiliar journey without assistance.
47. In general, it cannot be said that the tribunal's approach was wrong in law. It took into account how the appellant's mental health affected his daily functioning as regards the questions it was required to address as a matter of law. It reached rational conclusions on the evidence, subject to what I will say below on the correct application of the law. Whereas the appellant had experienced a life threatening episode involving an overdose of medication, this was taken into account in the award of points for managing medication. For the reasons that I gave in *EH v Department for Communities* [2018] NI Com 55, no higher level of points could be awarded. This is a matter for the political choice of those making the legislation, rather than those charged with applying it.
48. While I can understand the appellant's confusion that someone who has overdosed in the past would be asked questions about his ability to prepare food, for example, the tribunal had no option in the circumstances but to ask questions that elicited replies relevant to the statutory criteria that the law required it to apply. I cannot accept that it has erred in law on this ground.

Second ground – qualification of healthcare professional

49. The PIP regulations also provide for the assessment of entitlement. The specific regulation that gives rise to the assessment of the healthcare professional is regulation 9. This provides:

9.—(1) Where it falls to be determined whether C has limited ability or severely limited ability to carry out daily living activities or mobility activities, C may be required to do either or both of the following—

(a) attend for and participate in a consultation in person;

(b) participate in a consultation by telephone.

(2) Subject to paragraph (3), where C fails without good reason to attend for or participate in a consultation referred to in paragraph (1), a negative determination must be made.

(3) Paragraph (2) does not apply unless—

(a) written notice of the date, time and, where applicable, place for the consultation is sent to C at least 7 days in advance; or

(b) C agrees, whether in writing or otherwise, to accept a shorter period of notice of those matters.

(4) In paragraph (3), reference to written notice includes notice sent by electronic communication where C has agreed to accept correspondence in that way and “electronic communication” has the meaning given in section 4(1) of the Electronic Communications Act (Northern Ireland) 2001.

(5) In this regulation, a reference to consultation is to a consultation with a person approved by the Department.

50. Regulation 9(5) is the key. It is simply enough that the person holding the consultation has been approved by the Department for that purpose.
51. The appellant has asked me to consider the Health and Social Care Professions Council’s standards of proficiency for physiotherapists, setting out their duty to report and standards of proficiency in practice. However, I do not consider that the HCP in this instance was seeing the appellant in a treatment context, or that the standards were intended to refer to a physiotherapist acting in the capacity of HCP.
52. The appellant has asked me to consider the guidelines to providers carrying out assessments for PIP issued by the DWP in Great Britain. I accept that these are relevant, as indicative of the similar practices followed in Northern Ireland. The appellant points out relevant requirements, such as that providers must be able to demonstrate that HCPs have appropriate knowledge of the clinical aspects and likely functional effects of a wide range of health conditions and disabilities.
53. There is general validity to the issues raised by the appellant. I accept the general proposition that HCPs must be approved by the Department and must comply with guidelines in operation. However, the statutory jurisdiction that I have is to consider whether the tribunal – rather than the HCP or the Department – has erred in law. Yet, whereas the matters raised by the appellant affect the credibility to be given to the evidence before the tribunal, it is not evident to me that it placed particularly strong weight on the evidence of the HCP.
54. The tribunal had the opportunity to look at a range of other evidence, including the oral evidence of the appellant, including his criticism of the HCP’s report, to see his medical records, the medical evidence he handed in, and it was also able to look at him and make observations.

When I consider the findings of the tribunal, it appears to me that the HCP report was not relied upon particularly, apart from when assessing mobility activity 1. That aspect of the evidence was the HCP's report of what the appellant had said to him.

55. In the final analysis, the tribunal did not rely on the HCP's qualifications to any extent, and the fact that the HCP was not qualified in relation to mental health was immaterial to the outcome.

Third ground – the system's and the tribunal's "duty of care" to him as a vulnerable person

56. The appellant's third ground challenges aspects of the system for assessment of PIP entitlement. He outlines traumatic childhood factors affecting his current mental health and he focuses on an event in August 2016 involving the consumption of prescription drugs and alcohol that resulted in hospital intensive care unit admission. He indicates that he sought to defer his assessment due to his vulnerability at that period and should not have been called to an assessment, due to Departmental guidelines in place for assessors.
57. The appellant reports being "triggered" by the assessment of the HCP. He refers to particular issues such as when relating the incident where he had passed out on street, resulting in an ICU admission, when the physiotherapist HCP had said that this was not relevant to his assessment.
58. More generally, the appellant refers to consequences of his childhood clerical sexual abuse. He submits that he had flagged issues up in advance by way of a letter dated 23 January 2017. He submits that a one-to-one meeting with a male in a position of power was harmful to him and that there should have been a female assessor. However, it appears to me that the letter was a general document ranging over a number of disabilities which did not expressly object to a consultation with a male HCP. In the letter the appellant raised the Equality Act 2010 and submitted that he was a disabled person for the purposes of that legislation.
59. I do not doubt that the appellant experienced difficulties with the assessment process. The types of problems that arise for vulnerable people with mental health conditions in the assessment process – and the scope of the Equality Act 2010 in proceedings in Northern Ireland - have been considered by the Commissioners in the case of *PA v Department for Communities* [2019] NI Com 29. In short, whatever difficulties arise in the course of an assessment by the Department, the tribunal has an opportunity to address them and deal with any unfairness.
60. The appellant submits that the tribunal has a "duty of care" towards him. This is a concept taken from civil law and is the basis of liability in tort.

However, the tribunal is not in the position of, for example, a clinician who is treating a patient and who owes a duty of care not to act negligently in the context of the medical practitioner-patient relationship. The tribunal was not treating the appellant. It owed him a duty to act fairly – and to make appropriate allowances for his mental health in its arrangements for adducing his evidence and determining his appeal. The appellant was represented at hearing and was accompanied by his sister. Had he not been sufficiently well to proceed with the tribunal hearing, I would have expected his representative or his sister to have intervened. As Mr Hinton submitted, the appellant appeared to state his evidence clearly and articulately.

61. In *SA v Department for Communities* [2020] NI Com 38, a Tribunal of Commissioners addressed issues of fairness in tribunals where appellants had identifiable difficulties giving evidence. We said:

“38. Against this background, a key issue is the process of identification of obstacles to effective participation in individual cases. This is a judicial task which is the responsibility of the appeal tribunal. Where appellants directly indicate that they have disabilities which might be expected to affect their ability to participate in a hearing or issues are otherwise apparent from the tribunal papers, a tribunal would be expected to address these and seek to work around them. The fact that an appellant is represented might create an expectation that these issues should be raised on an appellant’s behalf by the representative, but ultimately the responsibility for the fairness of the hearing lies with the tribunal. Having said that, once potential unfairness is identified by a tribunal, it is entitled to address a representative, who knows the appellant, to ascertain what steps might be taken to ameliorate the potential for unfairness”.

62. The appellant indicates that he found the experience traumatic. I cannot dispute the appellant’s subjective and personal response to the tribunal hearing. Just as he was “triggered” by the HCP, in his submissions to me he relates some post-hearing actions that indicate that he was similarly “triggered” by the medical member of the tribunal.
63. In retrospect, it might have been better for the appellant to find a different way of giving his evidence to the tribunal. As indicated in *SA v DfC*, tribunals are encouraged to actively consider the needs of vulnerable people appearing before them in order to ensure the fairness of the proceedings. While acknowledging that the appellant found the experience distressing, and while I regret that fact, on the face of the record it does not appear, however, that there was any unfairness in the proceedings. The appellant gave evidence and it does not appear that

there were aspects of evidence that are before me that were not also before the tribunal. Therefore, I cannot accept that the tribunal has erred in law on this ground.

Other errors of law

64. As Commissioner I have an inquisitorial jurisdiction, which means that I can consider possible errors of law that are not raised by the parties. It appears to me that there are two issues that require further investigation.

65. The first is that the appellant gave direct evidence that he wore incontinence pads, due to the problems he experienced with urinary dribbling. Evidence referred to urinary tract infections and catheterisation. The tribunal did not reject the evidence that the appellant used incontinence pads, as such, but noted the evidence of a locum GP, dated 13 February 2017 that he had no dribbling.

66. Activity 5 provides for an award of points as follows:

5. Managing toilet needs or incontinence.

a. Can manage toilet needs or incontinence unaided.	0
b. Needs to use an aid or appliance to be able to manage toilet needs or incontinence.	2
c. Needs supervision or prompting to be able to manage toilet needs.	2
d. Needs assistance to be able to manage toilet needs.	4
e. Needs assistance to be able to manage incontinence of either bladder or bowel.	6
f. Needs assistance to be able to manage incontinence of both bladder and bowel.	8

67. An incontinence pad is considered to be an aid from the point of view of descriptor 5.b, as I found in *JMcD-v-Department for Communities* [2019] NI Com 4, endorsing what Chief Commissioner Mullan said in *CD v Department for Communities* [2018] NI Com 30, in turn endorsing the

decision of Upper Tribunal Judge Rowley in *BS v The Secretary of State for Work and Pensions* [2016] UKUT 456 (AAC).

68. It seems to me that the tribunal had not expressly rejected the evidence of wearing pads, which would have led to an award of 2 points for descriptor 5.b. There was no reason to disbelieve the appellant on this issue, and the lack of reported dribbling on 13 February 2017 could not have been conclusive on this issue, as the longer term picture had to be considered. I consider that the tribunal has erred in its application of the law on this activity.

69. The second is a matter raised by the appellant late in the proceedings. He relies on the decision of Upper Tribunal Judge Jacobs in *RC v Secretary of State for Work and Pensions* [2017] UKUT 352. This decision addressed activity 9 – engaging with other people face to face. Activity 9 provides for an award of points as follows:

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.

70. Judge Jacobs advocated that tribunals should look at what the claimant says is preventing or inhibiting establishing relationships. If that evidence is accepted, the next question is whether that forms part of the claimant’s physical or mental condition (as in article 83 of the 2015 Order referred to above). Judge Jacobs had held that, contrary to the Secretary of State’s submission, establishing a relationship meant more than “the ability to reciprocate exchanges”. At para.14, Judge Jacobs said:

“... Relationships vary in duration (from fleeting to life-long), nature (acquaintance, business, friendship, partnership, sexual) and intensity. Head (c) refers to relationships without qualification. I take that to mean that it is concerned with skills relevant to relationships in general rather than with a particular type of relationship. And the focus is on establishing a relationship rather than nurturing or developing one”.

71. Evidence before me, and which was presumably therefore before the tribunal in the medical records, was a mental health social work report. Recalling the appellant's past history of childhood sexual abuse, this stated, before giving a summary/differential diagnosis of anxious avoidant personality disorder:

“No real relationships. He is of homosexual orientation. He doesn't have relationships due to bad experiences in the past and doesn't enjoy the gay scene... lives with his parents and two brothers. He doesn't like the location. He would see his family often. No social life, no very close friends... he described himself as shy introvert and apprehensive. Very sensitive to criticism. Low self-esteem, degree of perfectionism. Preoccupied by fear of rejection by family. Very confused re his sexuality. Anxious around people. He has no real close friends...”

72. The tribunal had evidence of the appellant's past referral to an addiction unit and his referral back to a psychosexual unit. It addressed whether the appellant could have engaged with other people unaided and concluded that he could at the date of claim. However, it appears to me on the evidence, taking the approach advocated by Judge Jacobs, which I endorse, that his mental condition clearly inhibited the appellant's ability to engage with other people face to face. I conclude that the tribunal has misdirected itself and has erred in law with regard to applying this activity also.
73. As I consider that the tribunal has materially erred in law in relation to activity 5 and activity 9, I allow the appeal. I set aside the decision of the appeal tribunal.
74. As the appeal relates to a closed period, and as the issues are discrete, in the light of the length of time that this appeal has been in train, I consider that I should decide the appeal myself, rather than refer it to a newly constituted tribunal for determination.
75. I adopt the findings of the tribunal as regards the activities of preparing and cooking food, managing medication and washing/bathing, awarding points for descriptors 1(b) [2 points], 3(b)(ii) [1 point], 4(b) [2 points].

76. On the basis of the evidence before the tribunal, I award points for activity 5(b) [2 points].
77. I observe that the Department accepted in its decision of 22 March 2018 that the appellant satisfied descriptor 9.b. On the basis of the law as interpreted in *RC v SSWP*, and accepting the report of the mental health social worker referred to above, I also consider that points are merited for activity 9. I further award points for activity 9(b) [2 points].
78. On the basis of the evidence, I am not satisfied that the appellant satisfied the conditions of entitlement for an award of points under mobility activity 1.
79. As I have awarded 9 points for daily living activities, I allow the appeal from the decision of the Department of 14 February 2017. I substitute a decision that the appellant satisfies the conditions of entitlement to the standard rate of the daily living component from 22 June 2016 to 14 November 2017 inclusive.

(signed): Stockman

Commissioner

18 November 2020