

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 2 March 2020

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an application for leave to appeal on behalf of a claimant from the decision of an appeal tribunal with reference BM/6823/19/03/D.
2. An oral hearing of the application has not been requested.
3. 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 refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

4. This appeal addresses the failure of the Department to advise a tribunal that an appointee was acting on behalf of the claimant and the consequences of the tribunal failing to address whether to proceed in the absence of the appointee.
5. The claimant, born in 1998, had been awarded disability living allowance (DLA) at the low rate of the mobility component and the high rate of the care component from 5 June 2013 to 18 April 2017. As his award of DLA was due to terminate under legislative changes resulting from the Welfare Reform (NI) Order 2015, he was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). He duly claimed PIP from 7 December 2016, then aged 18, on the basis of

needs arising from attention deficit hyperactivity disorder (ADHD) and low pitch hearing deficit.

6. He was asked to complete a PIP2 questionnaire to describe the effects of his disability. His mother completed this and returned it to the Department on 23 December 2016. He asked for evidence relating to his previous DLA claim to be considered. The applicant was asked to attend a consultation with a healthcare professional (HCP). He attended the consultation along with his mother and the Department received a report of the consultation on 8 March 2017. On 21 March 2017 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 7 December 2016. The applicant's mother requested a reconsideration of the decision, submitting further evidence from his GP and a consultant ENT surgeon. Past DLA evidence was also received on 14 June 2017, including a DLA GP factual report dated 3 April 2015, a statement of special educational needs dated 12 September 2012. The Department received a supplementary medical advice note on 19 July 2017. The applicant was notified that the decision had been reconsidered by the Department but not revised. His mother appealed.
7. A hearing scheduled for 15 January 2018 was postponed on the basis that the applicant was sitting an examination on the same day. A hearing was scheduled for 7 June 2018. The applicant's mother requested a postponement on the basis that he had examinations in the month of June. It appears that a postponement was granted on that basis. However, the appeal was listed again for hearing on 16 May 2019. An appeal tribunal proceeded to determine the appeal in the applicant's absence. However, the decision of that tribunal was set aside on the basis that the applicant's mother had been ill and unable to attend.
8. The appeal was again listed for hearing on 2 March 2020. A postponement application was refused. The appeal was considered on 2 March 2020 by a newly constituted tribunal, consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The applicant's mother then requested a statement of reasons for the tribunal's decision. The application was late, but she indicated that she had a recent family bereavement and the late application was admitted.
9. The statement of reasons was issued on 15 July 2020. On 30 July 2020 the applicant's mother asked to appeal to the Commissioner. On 7 August 2020 the applicant's mother applied for setting aside of the tribunal's decision, on the basis that she had not been ready to speak to anyone about the applicant's condition but was now back on anti-depressants and had been recommended for counselling. The Appeals Service wrote to the applicant's mother to clarify whether she was seeking a setting aside or leave to appeal. She did not respond. Her correspondence was treated as an application to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was refused by the salaried LQM by a determination issued on 15 September 2020. On 24 September 2020 an

application was made to a Social Security Commissioner for leave to appeal.

Grounds

10. The applicant did not complete that part of the OSSC1 pro forma application form which requests an applicant to set out the grounds on which it is submitted that the tribunal has erred in law.
11. Nevertheless, by a routine office process, the Department was invited to make observations on the application. Ms Patterson of Decision Making Services (DMS) responded on behalf of the Department. She referred to letters which had been submitted to the LQM by the applicant's mother but which were not part of the application before me. Ms Patterson further referred to the applicant's mother as his "appointee".
12. Ms Patterson observed that the appointee had submitted to the LQM that she did not receive any paperwork (20 April 2020) and that she was unable to attend the hearing due to her own mental health condition (30 July 2020). She set out the tribunal's consideration of whether to adjourn in the absence of the appointee and applicant and submitted that it had dealt with the appeal fairly and had not materially erred in law. She indicated that the Department did not support the application.

Interlocutory matter

13. Ms Patterson's reference to an "appointee" was the first that I can discern on the face of the files in this case. The applicant's mother was named in the title page of the papers under the heading "Name and address of appointee/representative/any other respondents and their representatives (if any)", but no direct reference was made at any stage to the applicant having an appointee. The applicant was aged 21 at the date of the present application.
14. I observed that the applicant had been under the age of 16 at the date of the past DLA claim. Therefore it appeared likely that his mother had been appointed to act for him on the basis of regulation 43 of the Social Security (Claims and Payments) Regulations (NI) 1987 (the Claims and Payments Regulations), which applies to DLA claims by children. However, he was over 16 at the material dates in the present claim and such an appointment would no longer be in effect. In the expectation that she had possibly made an error when referring to an appointee, I directed Ms Patterson to identify the basis of appointment.
15. Ms Patterson duly provided a copy of an appointment for DLA purposes made on 28 May 2014, on the basis of ADHD, behavioural problems, asthma and hearing problems. This related to the period after the applicant's 16th birthday. It amounts to evidence that a valid appointment of the applicant's mother was made by the Department for the purposes of

DLA in 2014, premised on the applicant being “unable for the time being to act” under regulation 33 of the Claims and Payments Regulations.

16. In this context, I further take notice of regulation 28 of the Personal Independence Payment (Transitional Provisions) Regulations (Northern Ireland) 2016 (the Transitional Provisions Regulations). This provides:

28.—(1) This regulation applies where, immediately before any claim for personal independence payment is made by or on behalf of a person entitled to disability living allowance, there is a person (“the appointed person”)—

(a) appointed by the Department in accordance with regulation 33(1) of the 1987 Regulations (persons unable to act); or

(b) treated, by virtue of paragraph (1A) of that regulation(a), as being a person appointed by the Department in accordance with paragraph (1) of that regulation, to exercise rights on behalf of the person entitled to disability living allowance and receive and deal with any sums payable to that person.

(2) Where this regulation applies the appointed person shall be regarded as acting on behalf of the person entitled to disability living allowance for the purposes of the making and pursuit of a claim for personal independence payment under these Regulations and, where applicable, the Claims and Payments Regulations.

17. While I have not invited submissions of this issue, it appears to me that regulation 28 of the Transitional Provisions Regulations (Northern Ireland) 2016 has the effect of continuing the appointment made for DLA purposes into an appointment for PIP purposes (see *UB-v-Department for Communities* [2020] NI Com 55 at paragraphs 26-28). Therefore, the applicant in these proceedings does not act on his own behalf, but rather his mother acts for him.
18. The fact of making such an appointment implies that, for the purpose of administering his PIP claim, the Department accepts that the applicant is incapable of acting on his own behalf. To me, this appears a surprising proposition in light of the evidence that the applicant was attending an information technology course at technical college on three and a half days each week without special input, used a laptop to do online shopping and banking, socialised with friends for example by going to the cinema, travelled to college by bus independently and attended medical appointments independently. However, I consider that I do not have jurisdiction to go behind the Department’s appointment of the applicant’s mother to act on his behalf, or to hold that it is not validly made.
19. Nevertheless, if it has made such an appointment, it appears to me that the Department should exhibit the evidence of appointment in the submission it makes to an appeal tribunal. This will have the necessary

effect of clarifying the authority of, for example, a parent to continue to act on behalf of an adult son or daughter.

20. Further, as addressed in *UB v DfC*, while I consider that the fact of appointment is not binding on a tribunal as evidence of incapacity, it seems to require some further explanation by the Department as to why – if it accepts that an adult claimant is incapable of acting on his own behalf - it has not awarded any points under the potentially related activity 10 (“Making budgeting decisions”) in PIP cases.
21. However, this is not the key issue in the case. The key issue is that the appointee has a right of appeal under regulation 25(a)(iv) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999, which reads:

“For the purposes of Article 13(2), but subject to regulation 3ZA, the following other persons have a right to appeal to an appeal tribunal—

(a) any person appointed by the Department—

(i) ...

(iv) under regulation 33(1) of those Regulations to act on behalf of another;

22. It appears to me that under the Transitional Provisions Regulations the applicant’s mother is validly the applicant’s appointee. The letter of appeal at Tab 1 of the tribunal papers is signed in her name, rather than the applicant’s name. In short, while this was not expressly made clear at any point in the Department’s submission to the tribunal, she was the appellant to the tribunal in this case, not the applicant. I consider that this has implications that I will discuss below.

The tribunal’s decision

23. 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 PIP2 questionnaire completed by the applicant, general practitioner (GP) letters, past DLA evidence, a consultation report from the HCP and a supplementary report. The applicant did not attend the hearing.
24. The appeal had been listed for hearing on 2 March 2020, with the notice of hearing being issued on 10 February 2020. By an application received on 21 February 2020, postponement was requested - ambiguously under the applicant’s signature but I believe in the appointee’s handwriting - on the basis that she was “not ready to talk to anyone yet”. The postponement was refused on 25 February 2020. The tribunal noted that when the applicant did not attend the hearing it considered whether it was fair to

proceed. It recorded that “we checked and were satisfied that the appellant had been given proper notification. We were also aware that the appellant had earlier applied to have his appeal postponed”. In light of all the circumstances, the tribunal decided not to adjourn.

25. The tribunal addressed the documentary evidence before it. It accepted that there were some underlying medical conditions, noting asthma and a hearing restriction with the need for a hearing aid, as well as a diagnosis of ADHD. The tribunal noted what the applicant was doing “at present”, which it felt indicated that he was able to function independently without restriction. Whereas the appointee had indicated restrictions, it did not find any independent evidence in support of this. It placed reliance on the HCP report and the level of medical management to support its findings.

Relevant legislation

26. 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.
27. 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.
28. This appeal does not concern the application of the rules of entitlement to PIP so much as the general provisions governing the business of tribunals. These are the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the Decisions and Appeals Regulations). In relation to the conduct of tribunal hearings, these provide for the non-attendance of a party to the appeal at regulation 49(4) which reads:

“(4) If a party to whom notice has been given under paragraph (2) fails to appear at the hearing, the chairman or, in the case of a tribunal which has only one member, that member, may, having regard to all the circumstances including any explanation offered for the absence, proceed with the hearing notwithstanding his absence, or give such directions with a view to the determination of the appeal as he may think proper”.

Submissions

29. As indicated above, the application to the Social Security Commissioner for leave to appeal did not state any grounds. In the absence of any ground of application having been submitted, and in the light that there was evidence that the applicant had an appointee to act on his behalf, I directed the appointee to set out the grounds of her application. These were received on 22 February 2021. In all the circumstances of this case, I admit the late grounds and I waive the irregularity in the proceedings.
30. The grounds now submitted by the appointee are that the decision was wrong as the applicant has a hearing aid and ADHD and cannot do normal daily tasks without her with him. She submitted that the tribunal was wrong to proceed with the hearing in her absence and in the absence of the applicant – submitting that they were “told not to attend due to Covid-19”. She further submitted that the findings of fact and the reasons for the tribunal’s decision were inadequate, submitting that a hearing aid was relevant to activity 3 (Managing therapy or monitoring a health condition).
31. I directed that Ms Patterson should be given an opportunity to make observations on the grounds of the application to the Commissioner.
32. Ms Patterson submitted that the tribunal demonstrated that it gave full consideration to the effects of the applicant’s hearing problem on his ability to perform the PIP activities, and whether a higher scoring descriptor was appropriate, coming to a reasonable conclusion that descriptor 7.b applies (‘needs to use an aid or appliance to be able to speak or hear’).
33. Ms Patterson submitted that a hearing aid would not fall under the scope of an aid for the purpose of activity 3, “Managing therapy or monitoring a health condition”. She submits that activity 3 considers a claimant’s ability to appropriately take prescribed medications in a domestic setting, monitor and detect changes in a health condition and manage therapeutic activities that are carried out in a domestic setting that are prescribed or recommended by a healthcare professional, without any of which their health is likely to deteriorate. She noted that, in the applicant’s case, it was documented that he declined to take any medication in respect of his ADHD 18 months prior to assessment for PIP.
34. She submitted that the tribunal had given consideration to the appointee’s account regarding the applicant’s health conditions and the needs that arise from them. She submitted that the tribunal gave adequate reasons for its conclusions in all relevant activities, within the scope of the statutory test.
35. In relation to the tribunal’s decision to proceed in the absence of the parties, Ms Patterson observed that in the appointee’s letter received by the Appeals Service on 30 July 2020, the reason given for having been unable to attend the hearing was the impact of her depression. In her application for leave to appeal, dated 7 August 2020, she indicated that she wished to apply to the Commissioner on the grounds that she hadn’t been in the frame of mind to speak to anyone about the applicant’s

condition due to her mental health and bereavements recent at the time of the hearing.

Assessment

36. 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.
37. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
38. 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.
39. However, the Commissioner is not confined to the issues raised by the formal grounds of appeal. Following *Mongan v Department for Social Development* [2005] NICA 16, a Commissioner has a role to identify arguable issues clearly apparent from the evidence, even if they have not been expressly articulated by the appellant.
40. I will not address the specific grounds of application made to me by the appointee, except to observe that a ground now relied upon is that the appointee was told not to attend the hearing due to Covid-19. However, the hearing date clearly pre-dated any Covid-19 lockdown in Northern Ireland and I am satisfied that there is no merit in this ground. However, I consider that I should grant leave to appeal, due to the fact of the appointment of the applicant's mother being omitted from the Departmental submission to the tribunal.
41. The tribunal in this case has given a clear statement of its reasons for the decision made. It has dealt with the applicant's absence on the day of hearing over the course of 7 paragraphs. In considering whether to proceed in the absence of the applicant, it has addressed the issue of procedural fairness arising from *Galo v Bombardier*. In many ways it has given an exemplary decision. However, it has been led into error by the material omission in the Department's submission as to who was actually the appellant in the case.
42. I will not address the specific requirements of regulation 49(4) above, which have been addressed at length in the case of *DS v Department for Communities* [2021] NI Com [22]. It is enough to indicate that the consequence of being led into error was that the grounds for proceeding in the absence of the appellant/appointee were considered entirely in terms of the applicant's condition. It is through no fault of the tribunal that

it has been misled as to the material facts. However, in deciding whether to proceed in the absence of the individual it understood to be the appellant, it addressed itself to the wrong factual matrix.

43. The submissions of the appointee clarify that it was her own mental health problems that have prevented her attending an appeal hearing and pursuing the appeal on behalf of the applicant. The tribunal has not addressed itself to her circumstances. Yet all along, this has been the appointee's appeal. As the tribunal did not focus on her, and understandably so given the lack of reference to any formal appointment made by the Department in the tribunal papers, it has erred in law.
44. I consider that I must allow the appeal. I decide that the tribunal has erred in law on the grounds of procedural unfairness. I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

19 May 2021