

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 21 November 2019

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 EK/6620/19/03/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 direct that the appeal shall be determined by a newly constituted tribunal.

REASONS

Background

4. The appellant had first been awarded disability living allowance (DLA) by the Department for Work and Pensions in Great Britain from 16 March 2009, most recently at the low rate of the mobility component and the high rate of the care component. As he reached the age of 16, his award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015. Consequently, he claimed personal independence payment (PIP) from the Department for Communities (the Department) from 4 January 2019 on the basis of needs arising from Asperger's syndrome, ADHD, enuresis and self-esteem issues.

5. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 4 February 2019. He asked for evidence relating to his previous DLA claim to be considered. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received an audited report of the consultation on 10 April 2019. On 23 May 2019 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 4 January 2019. The appellant requested a reconsideration of the decision. He was notified that the decision had been reconsidered by the Department but not revised. He appealed.
6. The appeal was considered on 21 November 2019 in the appellant's absence by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 18 January 2021. 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 March 2021. On 29 April 2021 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

7. The appellant, represented by Ms Williams of Community Advice Fermanagh, submits that the tribunal has erred in law by:
 - (i) not being given an opportunity to attend his tribunal hearing;
 - (ii) not fully considering the relevant daily living activities.
8. The Department was invited to make observations on the appellant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted that the tribunal had erred in law by proceeding in the absence of the appellant. He indicated that the Department supported the application

The tribunal's decision

9. 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 appellant, a DLA paediatric report, an audited consultation report from the HCP, reconsideration requests and a supplementary medical report. The tribunal also had a determination from the LQM dated 13 November 2019 refusing postponement on the basis that the appellant's representative was unavailable on the day of hearing.
10. The panel observed that the appellant had not attended the hearing. It observed that he had provided no additional evidence and that he had

previously sought postponement. In his absence, it proceeded to treat that earlier application as an adjournment request. It refused the application and proceeded to hearing. The tribunal addressed the report of the HCP. Basing its findings of fact on that report it decided that the appellant did not satisfy the conditions of entitlement to PIP at any rate. It disallowed the appeal.

Relevant legislation

11. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component. These components may be payable to claimants whose ability to carry out daily activities or mobility activities is limited, or severely limited, by their physical or mental condition. The Personal Independence Payment Regulations (NI) 2016 (the 2016 Regulations) set out the detailed requirements for satisfying the above conditions.
12. The 2016 Regulations provide for points to be awarded when a descriptor set out in Schedule 1, Part 2 (daily living activities table) or Schedule 1, Part 3 (mobility activities table) is satisfied. Subject to other conditions of entitlement, in each of the components a claimant who obtains a score of 8 points will be awarded the standard rate of that component, while a claimant who obtains a score of 12 points will be awarded the enhanced rate of that component.
13. Additionally, by regulation 4, certain other parameters for the assessment of daily living and mobility activities, as follows:
 - 4.—(1) For the purposes of Article 82(2) and Article 83 or, as the case may be, 84 whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment taking account of relevant medical evidence.
 - (2) C's ability to carry out an activity is to be assessed—
 - (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or
 - (b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.
 - (3) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—

- (a) safely;
- (b) to an acceptable standard;
- (c) repeatedly; and
- (d) within a reasonable time period.

(4) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(5) In this regulation—

“reasonable time period” means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person’s ability to carry out the activity in question would normally take to complete that activity;

“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.

Assessment

14. 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.
15. 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.
16. 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.
17. Ms Williams submits on the appellant’s behalf that the notice of the determination refusing postponement of the hearing was not received by the appellant until after the hearing date. She submits that the tribunal did not adequately address the daily living activities of Preparing food,

Managing therapy, Washing/bathing, Dressing/undressing and Communicating.

18. Mr Killeen for the Department observed that the tribunal had addressed the unsuccessful postponement application at the hearing as an adjournment request, but had refused it. He observed that the tribunal stated no reasons for that refusal, citing Chief Commissioner Mullan in C37/08-09(DLA) at paragraph 32 as authority for the proposition that the tribunal must give reasons for refusing to adjourn.
19. He further observed that the principles expressed by the Court of Appeal in *Galo v Bombardier Aerospace* [2016] NICA 25 arguably were not applied in the case, namely that it was “a fundamental right of a person with a disability to enjoy a fair hearing and to have been able to participate effectively in the hearing”. He agreed with the appellant that the tribunal had erred in law. As each of the parties submits that the tribunal has erred in law, I grant leave to appeal.
20. In *DJS v Department for Communities* [2021] NI Com 22 I observed that the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the Decisions and Appeals Regulations) 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”.
21. In this case, the appellant was a 16 year old, who had a previous history of DLA awards on the basis of conditions that included Asperger’s syndrome and ADHD. He was previously represented for DLA purposes by his mother as his appointee, but there had been no appointment made in the context of his PIP claim. His application for postponement was made on the basis of wanting his representative to attend. No representative was named.
22. In *DJS v DfC*, I observed that a tribunal had a wide margin of appreciation when exercising discretion under regulation 49(4). However, at paragraph 37, I set out a number of relevant principles, derived from the jurisprudence of the High Court and Court of Appeal in Northern Ireland under which the exercise of discretion might be reviewed, as follows:

“37. In the exercise of supervisory jurisdiction over the decision of a tribunal that has involved the exercise of

judicial discretion, it seems to me that the Commissioner must decide whether the LQM or tribunal:

- (i) made a mistake in law or disregarded principle;
- (ii) misunderstood the facts;
- (iii) took into account irrelevant matters or disregarded relevant matters;
- (iv) reached a decision that was outside the bounds of reasonable decision making;
- (v) gave rise to injustice”.

23. It appears to me that Mr Killeen is correct to draw my attention to C37/08-09(DLA). The tribunal does not give reasons for refusing to grant an adjournment. It merely indicates that it refused it. The application of any supervisory jurisdiction of the Commissioner is predicated on an ability to understand why a tribunal has reached the decision it has. I consider that the tribunal has erred in law by failing to state reasons for exercising its discretion to refuse adjournment in the circumstances.
24. This was the first listing of the appeal hearing. The appellant’s purpose in requesting postponement or adjournment was in order that, as a 16-year old with Asperger’s syndrome, he might be represented before the tribunal. The tribunal does not indicate whether it has addressed the right, articulated by the Court of Appeal in *Galo*, of the appellant as a person with a disability to enjoy a fair hearing and to be able to participate effectively in the hearing. However, it appears evident from its decision that it has not. I consider that the tribunal has erred in law by failing to consider any obligation to enable participation in the hearing by the appellant.
25. I accept the submissions of the parties that the tribunal has erred in law. I set aside the decision of the appeal tribunal. I direct that the appeal shall be determined by a newly constituted tribunal.

(signed): O Stockman

Commissioner

11 August 2021