

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 28 August 2019

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The decision of the appeal tribunal dated 28 August 2019 is in error of law.
2. 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.
3. I am able to exercise the power conferred on me by Article 15(8)(a)(ii) of the Social Security (Northern Ireland) Order 1998 to give the decision which I consider the appeal tribunal should have given as I can do so having made a further finding of fact. The fresh finding in fact is that based on the evidence which is before me the appellant needs assistance to either prepare or cook a simple meal.
4. This fresh finding of fact permits me to apply an alternative descriptor in respect of activity 1 in Part 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations') to the one which the appeal tribunal applied. The score for this descriptor - descriptor e - combined with the scores for the other Part 2 descriptors which were applied by the appeal tribunal is sufficient for an award of entitlement to the daily living component of Personal Independence Payment (PIP) at the standard rate.
5. My substituted decision, therefore, is that the appellant is entitled to the daily living component of PIP at the standard rate from 11 April 2018 to 10 April 2021. This is in addition to the award of the mobility component of PIP at the standard rate awarded by the appeal tribunal for the same fixed period.

Background

6. On 7 March 2018 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 15 January 2018. Following a request to that effect, the decision dated 7 March 2018 was reconsidered on 17 April 2018 but was not changed. An appeal against the decision dated 7 March 2018 was received in the Department on 1 May 2018.
7. Following two earlier adjournments, the substantive appeal tribunal hearing took place on 28 August 2019. The appellant proceeded on consideration of the papers alone. The appellant had signed form REG2(i)d on 9 July 2018 to indicate that she was content for the appeal to proceed without an oral hearing. The appeal tribunal allowed the appeal in part making an award of entitlement to the mobility component of PIP at the standard rate but disallowed entitlement to the daily living component.
8. On 3 February 2020 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). On 6 March 2020 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

Proceedings before the Social Security Commissioner

9. On 30 March 2020 a further application for leave to appeal was received in the Office of the Social Security Commissioners. On 23 June 2020 observations on the application for leave to appeal were requested from Decision Making Services (DMS). In written observations dated 8 July 2020, Mr Arthurs, for DMS, supported the application for leave to appeal on one of the grounds submitted on behalf of the appellant. Written observations were shared with the appellant and her representative on 8 July 2020.
10. On 1 October 2020 I granted leave to appeal. In granting leave to appeal, I gave as a reason that it was arguable that the appeal tribunal had not taken the proper approach to the potential applicability of activity 1 in Part 2 of Schedule 1 to the 2016 Regulations. On the same date I determined that an oral hearing of the appeal would not be required.
11. In the latter part of 2020 and into the first half of 2021 priority had to be given to a large group of cases in the Office of the Social Security Commissioners. This has led to a delay in the promulgation of this decision for which apologies are extended to the appellant, her representative and Mr Arthurs.

Errors of law

12. 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?
13. 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

14. In the application for leave to appeal, which was received in the Office of the Social Security Commissioners, the appellant’s representative made the following submission on behalf of the appellant:

‘In the preparing of food the tribunal has made a mistake to a material fact that yes I can follow a simple recipe but with the arthritis an pains in my hands I cannot hold or carry pots of hot food which is a danger to myself and others.’

15. In his written observations on the application for leave to appeal, Mr Arthurs has made the following submissions:

(The appellant) contends that her physical ailments such as arthritis and pains in her hands makes it difficult to safely complete some of the actions required to prepare food. In her application for leave to appeal she refers specifically to holding or carrying pots of hot food.

Before addressing the tribunal's reasons I will point out that (the appellant) chose for the tribunal to proceed on the strength of the papers before it and to not attend the hearing. Therefore the tribunal was unable to receive testimony from (the appellant) that would provide context for the conclusions drawn from the medical and historic claim data.

Turning now to the tribunal's reasons I note paragraphs 2 and 6 under the heading Findings of Fact:

"2. (The appellant) was diagnosed in 2000 by her GP as suffering from arthritis. She has surgery on both hands about 10 to 20 years ago, and has some deformity of the bones in her hands and fingers of both hands. She gets pain in her fingers. On clinical examination, she was able to maintain a power and pinch grip in both hands.

...

6. (The appellant) is able to stand to make a meal, but after 5 minutes, she finds she has to sit down because of the pain in her back"

In paragraph 9 of Reasons and Conclusions the tribunal recorded the following:

"9. ... In respect of Preparing Food, the Tribunal relied on the fact that (the appellant) does not suffer from any mental health or cognitive problems, and therefore she would be able to follow the steps in a simple recipe for a meal for one person. Given that she does not suffer from depression or low mood, there is no reason why she would need prompted in order to prepare food. However, we accept that she would reasonable require the use of an aid or appliance given her back problems in order to complete this activity, for the standards set out in Regulation 4. '2'

points were therefore awarded for Preparing Food.”

I believe the above excerpts demonstrate that the tribunal noted the problems (the appellant) has with her hands and also her back. However the tribunal only applied functional restrictions arising from her back pain to the descriptors. As (the appellant) was not present at the hearing she was not in a position to advise the tribunal that one or both might present a problem on any given day. Therefore I must review the evidence bundle available to the tribunal to determine if it was ever claimed by (the appellant) that her hand conditions prevent her from completing this activity safely, to an acceptable standard, repeatedly and within a reasonable time period.

Initially I will review the claimant's PIP2 application form, section Q3c, where it is recorded:

“Need help lifting objects such as bags of shopping, placing cans & food into cupboards, opening cans & bags of food. Needs pots of food lifted for draining & serving also need help with taking food out of the oven, to check and serve.”

Some of the actions recorded here are not covered by the descriptors within this activity such as *“lifting objects such as shopping placing cans & food into cupboards”*, However the following are noteworthy for the reasons I provide:

- *“opening cans & bags of food”* – these actions would be directly linked to functions related to dexterity of the hands; and
- *“needs pots of food lifted for draining & serving”* – these would be actions linked to functions related to dexterity and strength of the hands and also possibly the spine.

Moving on, I will now review the PA4 V3 medical assessment report where the DA has recorded, in the section titled *Functional History, including variability, Daily living activities and mobility activities*, and in relation to Preparing Food:

“She is usually not able to make herself dinner because difficulty lifting heavy objects. She gets back pain when standing for prolonged periods. Can stand for about

five minutes before having to sit down. She has pain in her hands when preparing food.”

After receiving the Department’s response to her initial application (the appellant) applied for a Mandatory Reconsideration. On her application dated 19 March 2018 (the appellant) recorded the following:

“Preparing Food – I stated in previous form I can’t open cans & bags of food & difficulty lifting pots & pans because of my fingers so how can I attempt safely to cook a simple meal.”

(The appellant) was not successful in achieving the desired award at Mandatory Reconsideration stage and subsequently submitted an appeal. In her application for appeal dated 28 April 2018 (the appellant) stated the following:

“I disagree with the decision because it said I can cook a simple meal I can’t open tins, lift heavy pots of hot food because I have arthritis in my hands and had operations for trigger finger on both hands. My partner cooks most of 90% of are (sic) meals.”

I believe that the above excerpts prove beyond any doubt that (the appellant) was seeking an award based on an inability to safely cook food due to her limited dexterity and strength in her hands. Although (the appellant) was not present at the hearing to raise this matter, the available evidence was littered with references to the issues with her hands and on the face of it the tribunal has erred in law by failing to consider this.

In the interest of fairness I will try to suggest a reason as to why the tribunal has not recognised (the appellant’s) as a significant issue. In paragraph 10 of its reasons, relating to the Daily Living activity Taking Nutrition, the tribunal provided the following reasons:

“In respect of Taking Nutrition...We relied on the musculoskeletal examination conducted by the Healthcare Professional which confirmed that (the appellant) was able to maintain a power grip and pinch grip in both her hands. This indicated to us that she had sufficient power and pinch in both of her hands to feed herself independently.”

I submit that the tribunal may have recognised that (the appellant) was not so significantly impacted by her conditions that she did not need assistance of any kind to take nutrition and this could be applicable to the activity of Preparing Food in that she may not have had any issue preparing food for cooking i.e. she could have opened tins or bags and chopped vegetables or meat. However this was just one element of (the appellant's) claim. She claimed, at every point in the process, that she has a problem with lifting heavy pots and pans filled with hot ingredients. This requires an entirely different degree of dexterity and strength than that required for holding a knife or fork.

The tribunal has awarded 2 points due to its recognition of (the appellant's) need for an aid in relation to Preparing Food; the aid being any suitable aid that would provide her relief when she gets a pain in her back and needs support to continue completing the activity safely. However this was never the crux of (the appellant's) claim on this activity and it would seem the tribunal has promoted this to the forefront without addressing her primary issues in completing this activity i.e. the need for assistance in preparing food. If this need was recognised this would lead to an award of 4 points under descriptor (e), meaning that (the appellant) would receive an additional 2 points and would therefore cross the threshold for qualification for the standard rate of Daily Living.

The failure of the tribunal to recognise this is a material error of law and I support the appellant's application on this ground.'

Consideration

16. I agree with Mr Arthurs' careful analysis and, for the reasons which he has set out, agree that the decision of the appeal tribunal is in error of law. There was, as Mr Arthurs has pointed out, ample evidence before the appeal tribunal to suggest that a higher-scoring descriptor in respect of activity 1 in Part 2 of Schedule 1 to the 2016 Regulations should be applied. The error is material as had the appeal tribunal applied the higher-

scoring descriptor it would have led to an award of the daily living component at the standard rate.

(signed): K Mullan

Chief Commissioner

6 October 2021