

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 16 June 2021

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 BE/4691/19/02/D.
2. For the reasons I give below, I allow the appeal 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, having regard to the further directions that I have set out below.

REASONS

Background

3. This case addresses the standing of oral evidence given in a part-heard case before a differently constituted tribunal.
4. The appellant had been awarded personal independence payment (PIP) by the Department for Communities (the Department) from 1 March 2017. She was asked to complete an AR1 form to report any changes to her conditions or disability and returned this to the Department on 14 January 2018 indicating that she had a brain tumour, type 2 neurofibromatosis, deafness in the left ear, left side weakness, anxiety and depression. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 24 April 2019. On 10 May 2019 the Department decided to supersede the existing award of PIP and decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 10 May 2019. The appellant requested a reconsideration of the decision. She was notified that the

decision had been reconsidered by the Department but not revised. She appealed.

5. Following the adjournment of a hearing on 10 March 2020, part-heard, the appeal was decided on 16 June 2021 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 12 August 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 28 October 2021. On 26 November 2021 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant, represented by Law Centre NI, submits that the tribunal has erred in law by reason of:
 - (i) procedural unfairness;
 - (ii) failing to give weight to or take relevant factors into account;
 - (iii) making irrational findings;
 - (iv) failing to resolve conflicts of fact or opinion;
 - (v) applying the wrong legal test.
7. 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 accepted that the tribunal had erred in law. He indicated that the Department supported the application, on grounds relating to the fact that oral evidence previously given by the appellant was not taken into account by the tribunal, and the possibility that unfairness had resulted.
8. As each of the parties submitted that the tribunal had erred in law, I granted leave to appeal.

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, which included an AR1 review form completed by the appellant, a consultation report from the HCP and a prescription list; medical records relating to the appellant; a supplementary Departmental response; a submission from Law Centre NI; the record of proceedings of an earlier tribunal hearing at which evidence was recorded by the tribunal; and a consultant neurosurgeon's letter. The

tribunal had been notified that the appellant would not attend a hearing, and it proceeded by way of a “paper hearing” with no oral evidence.

10. The tribunal noted that this was an appeal from a supersession decision which had removed entitlement to standard rate daily living component and enhanced rate mobility component. The tribunal addressed the appellant’s submission and the evidence before it. It identified grounds for supersession, namely that the Department had received medical evidence from a HCP. The tribunal observed that the appellant underwent surgery in 2016 to remove a brain tumour. It found that there was conflict between her statements regarding her needs in 2019 and the medical records, placing most weight on the medical records as a more objective and reliable indicator of functionality. It addressed the daily living and mobility activities but found that the appellant did not satisfy the requirements of any descriptors, apart from 7(b) arising from her use of a hearing aid. It therefore disallowed the appeal. In reaching this decision, it expressly disregarded the oral evidence recorded by the tribunal at the adjourned, part-heard hearing, on the basis that it was illegible.

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.

Hearing

14. Although the parties were in agreement on core issues and prospective outcome, I wished to hear further argument on the principles engaged in the case. Therefore, I directed an oral hearing of the appeal. v Ms Rothwell of Law Centre NI appeared for the appellant, and Mr Killeen on DMS appeared for the Department. I am grateful to the representatives for their assistance in the written submissions and at hearing.

15. Ms Rothwell outlined the background to the previous adjournment. The appellant had attended the hearing and given oral evidence. The LQM then recorded:

“The Appellant appears to have become distressed during the hearing and has indicated a wish not to give further evidence. There are still a considerable number of evidential issues to be explored and the Tribunal feels that

it is not in the interests of justice to continue today in the above circumstances”.

16. The tribunal directed that the appeal should be relisted before the same panel. However, it came before a differently constituted panel, albeit including the same LQM as previously. The LQM recorded that the evidence of the previously adjourned hearing:

“has not been typed up and has not formed part of the documentation taken into consideration by the present panel (only the terms of the adjournment have been read and noted). The appeal proceeds by way of a paper determination”.

17. This was further confirmed by the statement of reasons which indicated that all the evidence considered “did not include the handwritten – and largely illegible – note of evidence at the adjourned hearing on 10.03.20”. Ms Rothwell observed that, despite the statement that the notes from the previous hearing were illegible, both hearings were chaired by the same LQM. She submitted that the tribunal had erred in law by unfairly proceeding to determine the appeal without obtaining a legible record of the oral evidence given at the previous hearing.

18. She submitted that the LQM was required to make a record of the proceedings “sufficient to indicate the evidence taken” by regulation 55(1) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the Decisions and Appeals Regulations). She observed the remarks on the Tribunal of Commissioners in reported Great Britain Commissioner’s decision R(DLA)3/08 who confirmed:

“... whatever the medium might be, the record must be intelligible or capable of being made intelligible to those to whom it is issue. The obvious remedy where a record of proceedings in illegible is to ask the clerk to obtain and supply a legible version”.

19. She submitted, relying further on the Great Britain Upper Tribunal decision in *MK v Secretary of State for Work and Pensions* [2012] UKUT 293, that while a failure to comply with regulation 55(1) will not necessarily render a tribunal’s decision erroneous in law, it may do if the appellant can show that such a failure was material to the decision in the sense that it has resulted in a real possibility of unfairness or injustice.

20. She further submitted that the composition of the tribunal was problematic. She referred to the reported decision of a Great Britain Tribunal of Commissioners in R(U)3/88 where it was said at paragraph 7:

“As the tribunal is differently constituted from the earlier one, which part-heard the case, it would be prudent for none of the members of the earlier tribunal to be included

as part of the second tribunal. The members are judges of fact at the hearing and it seems to us undesirable for a member to have a residual knowledge of evidence given at the earlier hearing which is not shared by the other members – knowledge of what was said as distinct from what was written down”.

21. In the post-Human Rights Act period, she referred to the decision of the Great Britain Social Security Commissioner in CDLA/2429/2004 on the relevance of Article 6 of the ECHR and the right to a fair hearing in such a context. The Commissioner echoed R(U)3/88 but noted the development of the legal concept of a fair hearing since 1988. He said that the Commissioners were concerned with the risk of residual knowledge in one of the members of the tribunal. He said that “there is always a risk of subconscious impressions being carried over from one hearing to another” and that, if all members of the tribunal do not have access to the same evidence, there is a reasonable basis for apprehension that there may not be a fair hearing.
22. Finally, Ms Rothwell submitted that, having given evidence at an earlier hearing, which was directed to be re-listed before the identically constituted panel, the appellant would not have known that her evidence was to be disregarded. She submitted that in circumstances where the panel was not identical and her previous evidence was going to be disregarded, the appellant should have been afforded an opportunity to consider whether she would wish to give oral evidence again.
23. Mr Killeen for the Department supported the appeal on procedural fairness grounds. He accepted certain of the submissions advanced by Ms Rothwell. He made particular reference to the Great Britain Upper Tribunal decision in *PD v Secretary of State for Work and Pensions* [2021] UKUT 172. He noted the reference at paragraph 54 to the commentary in Volume III of *Social Security Legislation 2020/21* (ed. Rowland and Ward, Sweet and Maxwell, London) to the effect that:

“where a case is adjourned after oral evidence has been given, it is necessary for a panel to have the same composition or be entirely differently composed, but that is not because the panel will have discussed the case among themselves but because if, say, the judge then sits with a different member on another occasion, he or she may be influenced by having heard evidence that the other member has not heard... All the members of the tribunal should determine the case on the basis of the same evidence.”

Assessment

24. Ms Rothwell initially focussed in her grounds upon unfairness arising from the tribunal's failure to address the record of oral evidence given to the previous tribunal. She has broadened her approach in skeleton argument to me and that approach finds echoes in that of the Department.
25. The first issue arising, it seems to me, is whether procedural unfairness may have resulted from the composition of the tribunal. The tribunal had part-heard the case in March 2020, until the point where the appellant was too upset to carry on. The tribunal expressly directed that the hearing, having been thus adjourned, should be concluded by the identically constituted panel. From the file before me, it appears that the present tribunal was not reconvened until October 2021.
26. It would appear that delays due to Covid-19 lockdowns intervened. It also appears that the appellant was sent a further form in January 2021 to offer a "paper" hearing and that she accepted this. In the context that a hearing by the identically constituted panel had been directed, I do not consider that this was necessarily the correct way forward, as an oral hearing had commenced and the holding of a "paper hearing" suggests that a different form of procedure had replaced this. The LQM refers to the case being previously adjourned as an oral hearing with a direction for the same panel to be reconvened, saying, "However, intervening circumstances have prevented that and the case is therefore being heard afresh by a differently constituted tribunal".
27. The "intervening circumstances" are not explained. I can understand that retirement of one of the members, or more tragically their illness or death, might prevent the panel being reconvened. However, neither I nor the parties are aware of the circumstances, and it would be more helpful if the nature of the intervening circumstances could be addressed on the record. There is no evidence of any direction by an LQM setting aside the direction of the previous panel. A direction is given under the power in regulation 38(1) of the Decisions and Appeals Regulations for the just, effective and efficient conduct of the proceedings. Without delving into detailed procedural law, once issued, I consider that a direction should either be complied with, amended or set aside. However, this does not appear to have happened here, with the implication that the direction was simply ignored.
28. The tribunal that decided the appeal in October 2021 included the same LQM as heard evidence in March 2020, but had two different panel members. Perhaps with some awareness of the difficulties inherent in that position, the tribunal disregarded the evidence previously heard and recorded by the LQM, observing that it was illegible. Leaving the legibility or otherwise of the evidence aside, it appears clear to me that case law in Great Britain, notably R(U) 3/88 and *PD v Secretary of State for Work and Pensions*, excludes members of the judiciary from participating in a future, differently constituted, tribunal if they have knowledge of evidence given

at an earlier hearing. The LQM may not have recalled exactly what was told to the previous tribunal and may have had genuine difficulty reading the record. However, unlike the other panel members, the LQM had actually seen and heard from the appellant in person. The case law discussed above establishes a number of principles that have universal application to tribunals, and I consider that these should be followed in Northern Ireland. In the circumstances of the present case, it appears to me that the risk of subconscious impressions being carried over from the March 2020 hearing to the October 2021 hearing is sufficient to create a reasonable apprehension that there may not have been a fair hearing.

29. I accept the submissions of the parties that the hearing did not comply with the requirements of procedural fairness and I allow the appeal on that basis.

Disposal

30. Each of the parties submits that the appeal should be determined by a newly constituted tribunal. Since procedural unfairness has been accepted in this case, even if it were possible to refer the appeal to the identically constituted tribunal as in March 2020 to conclude the hearing, I judge that such a course is not open to me. I accept therefore that the appeal should be determined by a newly constituted tribunal.
31. As these circumstances frustrate the direction of March 2020 that the appeal should resume before the identically constituted tribunal, I formally set aside that direction. However, remittal to a newly constituted tribunal gives rise to another question about the previously recorded evidence and whether it should be placed before the new tribunal in the absence of, or additional to, any oral evidence.
32. It is axiomatic that there are no formal rules to limit the admissibility of evidence in tribunals, except perhaps on human rights grounds (see *PMcC v Department for Communities* [2020] NI Com 65). The record of evidence of the tribunal in the March 2020 hearing, it seems to me, amounts to hearsay evidence. It is the LQM's recorded account of what the appellant told the first tribunal. Had the present tribunal been constituted differently and been able to proceed, that record would have been the only record of oral evidence given directly by the appellant. In such circumstances, and with appropriately diminished weight on the basis that it was hearsay, I consider that the record of the previous hearing ought to have been admitted as evidence.
33. The formal rationale of the tribunal was that it was excluded on the basis of illegibility. However, Ms Rothwell makes the fair point that the LQM had a duty to make a record of the proceedings "sufficient to indicate the evidence taken" and that, as confirmed in R(DLA)3/08, the obvious remedy where a record of proceedings in illegible is to ask the clerk to obtain and supply a legible version. I therefore direct that a typed and legible record

of evidence of the tribunal of March 2020 should be made available to the new tribunal.

34. I further direct that the appeal should be relisted as an oral hearing, giving the appellant and her representative an opportunity to attend. In the event of any reluctance on the part of the appellant to attend the new tribunal, I direct her representative to consider providing a written statement of evidence from the appellant to the new tribunal. The latter direction is not requiring the representative to adopt the particular course of action, and any choice not to provide a written statement should not give rise to any inference against the appellant.

(signed): O Stockman

Commissioner

5 May 2022