

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 18 November 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 NW/4341/19/03/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 under Article 15(8)(b) of the Social Security (NI) Order 1998 and refer the appeal to a newly constituted tribunal for determination.
4. The implication of this is that the appellant no longer satisfies the conditions of entitlement to the daily living component of Personal Independence Payment (PIP) from 3 April 2019 to 2 April 2024. Both daily living and mobility components will have to be addressed by the new tribunal.

REASONS

Background

5. The appellant had previously been awarded disability living allowance (DLA) from 7 November 2003, most recently at the low rate of the mobility component and the middle rate of the care component. As his award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, he claimed personal independence payment (PIP) from the Department for Communities (the Department) from 23 November 2018 on the basis of needs arising from

hypochondroplasia. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 20 December 2018. 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 a report of the consultation on 6 February 2019.

6. On 5 March 2019 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 23 November 2018. The appellant requested a reconsideration of the decision, submitting further evidence. The Department obtained a supplementary advice note on 11 April 2019. The appellant was notified that the decision had been reconsidered by the Department but not revised. He appealed.
7. The appeal was considered at a hearing on 18 November 2021 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal allowed the appeal in relation to the daily living component, awarding standard rate for a five year period to 2 April 2024, but disallowed the appeal in relation to the mobility component. The appellant then requested a statement of reasons for the tribunal's decision, and this was issued on 6 April 2022. 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 29 September 2022. On 18 October 2022, the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

8. The appellant, represented by his father, submits that the tribunal has erred in law by failing to apply case law correctly, referring to:
 - (i) *PR v Department for Communities* [2019] NI Com 75;
 - (ii) *AH v Secretary of State for Work and Pensions* [2018] UKUT 262;
 - (iii) *MH v Secretary of State for Work and Pensions* [2016] UKUT 531;
and
 - (iv) *RJ, GMcL and CS v Secretary of State for Work and Pensions* [2017] UKUT 105.
9. 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 materially erred in law. He indicated that the Department supported the application.

The tribunal's decision

10. 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 that it refers to as Appeal papers. I understand this to be a reference to the Department's submission, containing the PIP2 questionnaire completed by the appellant, past DLA evidence, a consultation report from the HCP and various letters and decisions. The statement of reasons also refers to the tribunal having access to the appellant's general practitioner notes and records. The appellant was outside the tribunal room but did not feel able to enter. His father attended the tribunal hearing to represent him and give oral evidence. The Department was not represented. At the outset, the tribunal referred to a previous adjournment, when the same LQM but two different panel members indicated a willingness to award standard rate daily living and mobility components, whereas the representative rejected this.
11. The tribunal made findings in relation to the daily living activities, accepting that the appellant required to use an aid for the purposes of activity 1 (Preparing food), activity 4 (Washing and bathing) and activity 5 (Managing toilet needs), and satisfied activity 9.b (Engaging with others) on the basis of difficulty engaging with strangers. It accepted that the appellant had relevant restrictions in physical mobility and awarded 4 points for mobility activity 2.b (Moving around). It therefore awarded the standard rate of the daily living component.

Relevant legislation

12. 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.
13. 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.
14. 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

15. 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.
16. 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.

17. 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.
18. As indicated above, Mr Killeen has offered support for this application. The first basis for this relates to medical evidence in the form of an MRI report of 6 November 2020 that indicated findings in keeping with pain on mobilising. That evidence post-dated the decision but supported the statements of the appellant in his PIP2, but was not referred to by the tribunal. Mr Killeen submitted that it was not obvious whether the tribunal overlooked the evidence or simply failed to address it in reasons. The second basis, accepted by Mr Killeen from the appellant's grounds, was that the tribunal had not had specific regard to safety, and whether the appellant would require assistance to cook.
19. Mr Killeen then raised another point in support of the application. He noted the references to the previous tribunal having determined to "offer" the appellant standard rate care and standard rate mobility on a previous hearing date, without hearing oral evidence. He noted my observations in the case of *RH v Department for Communities* [2022] NI Com 8, where I held that a tribunal that had adjourned after hearing evidence must either be identically constituted when it resumes or should be entirely differently constituted. I consider that he is correct to support the application on this ground.
20. I grant leave to appeal. I allow the appeal and I refer the matter to a newly constituted tribunal.

(signed): O Stockman

Commissioner

4 April 2023