

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHRN IRELAND) ORDER 1998**

**PERSONAL INDEPENDENCE PAYMENT**

Appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 7 June 2022

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

**This appeal by the claimant is dismissed. The decision of the Tribunal was not in material error of law, and it stands.**

**REASONS**

**Background**

1. The appeal below concerned entitlement to a Personal Independence Payment (PIP) under the Personal Independence Payment Regulations (Northern Ireland) 2016 (hereafter “the PIP Regulations”).
2. The appellant had claimed PIP on 4 February 2020. The claim was decided on 4 June 2020. She was then aged 54. The Departmental decision-maker did not score her any points under either the activities of daily living or the mobility activities in the schedule to the PIP regulations. A minimum of 8 points in the relevant category is necessary for an award of either component at the standard rate.
3. An appeal was lodged, and it came before the Tribunal almost two years later, on 7 June 2022. It was heard at an oral hearing before a legally qualified Chair, a medical doctor, and a member with experience of disability. That tribunal confirmed the decision of the Department for Communities (hereafter “the Department”) that no award of PIP was merited; indeed, it found that the appellant scored no points under the descriptors placed in issue, namely Activity 1, preparing food; Activity 4, washing and bathing; Activity 6, dressing and undressing; Activity 9, engaging with other people, or Activity 10, making budgeting decisions.

The Tribunal additionally considered the mobility Activities, although they were not specifically prayed in aid, and found they also did not apply.

4. At that hearing the appellant was assisted by a representative of the East Belfast Independent Advice Centre, which had also made a comprehensive written submission, citing case law from both Northern Ireland and the UK Upper Tribunal.
5. Following the unsuccessful initial appeal, the appellant's husband applied on her behalf for leave to appeal. The grounds put forward were well set out and easy to follow. Those submissions were effectively repeated before me.

### **Proceedings before the Commissioners**

6. Below, leave to appeal was given by the Tribunal Chair on the basis that the tribunal may have fallen into error in one respect, by drawing conclusions from the appellant's ability to get out of a car in answering the question as to whether she had point scoring difficulties getting in and out of a bath. I deal further with this issue below, but in summary, whilst I agree that the comparison may not have been entirely apt, my conclusion is that the tribunal decision was not thereby rendered unsound.
7. Following the grant of leave there were some questions about whether the appeal had been submitted late, but these were resolved in the appellant's favour, and it has proceeded by way of written submissions, and referral to me for further conduct.
8. The assistance of the appellant's husband has continued, and he has represented her before me. The Department is represented by Mr Killeen. I am grateful to them both for their carefully crafted submissions.
9. Neither party has requested an oral hearing and I do not think one is necessary in the interests of justice; I am able to decide the matter fairly on the papers before me.
10. Despite conceding that there may have been an error as identified by the Tribunal Chair, the Department did not support the appeal.

### **The arguments of the parties**

#### **The appellant**

11. The appellant, through her husband, maintains the arguments put forward in the grounds of appeal, clarifying them slightly following the submission of the Department.
12. Essentially, the challenge is in three areas:
  - (a) procedural errors, resulting in unfairness;

- (b) insufficient and perverse fact finding, and
  - (c) both paucity and illogicality of reasoning.
13. To illustrate these categories seven main points are made. I return to those below.

#### **The respondent**

14. Mr Killeen opposes the appeal. He submits that the reasons given by the Tribunal are adequate. He addresses the alleged procedural errors, as well as the aspects of the reasoned decision itself which are the subject of criticism and discusses the appellant's seven points individually.

#### **My approach**

15. Having considered the points, and Mr Killeen's response to them, I decided upon a more holistic approach, because save for some specific matters that I discuss initially, the Tribunal's reasons can really be described as a rejection of the extent of the appellant's claimed level of disability through adverse credibility findings. The Tribunal has sought to justify those findings, and my approach has been to consider whether that justification is sufficient.

#### **The relevant PIP activities and definitions**

16. I do not need to set out the relevant activities and definitions from the PIP Regulations, as in this case nothing turns on the wording of them.
17. I am satisfied that the Tribunal considered the various descriptors, that were in issue within the context of the generic statutory tests, as to the activities being able to be carried out safely, to an acceptable standard, repeatedly and within a reasonable time as set out in Regulation 4(3).

#### **My analysis**

18. I begin with those of the appellant's arguments which potentially affect the whole decision.

#### **The telephone assessment**

19. The Departmental decision had relied upon a telephone assessment with a healthcare professional. This was, the appellant has argued, unsatisfactory, and of itself an error of law.
20. During the COVID-19 pandemic much business was conducted remotely, including aspects of healthcare. It was not wrong for the Department to allow PIP assessments to take place in this way: regulation 9 of the Personal Independence Payment Regulations (Northern Ireland) 2016

(hereafter “the Regulations”) permits it. That does not mean that the healthcare professional’s assessment must be accepted, but it was necessary for the Tribunal to evaluate it as it would a face-to-face assessment.

21. Accordingly, that point has no merit of itself, but there was some evidence of difficulties being experienced by the appellant with her hearing at about this time and I have considered whether the telephone process was flawed by that.
22. The Tribunal clearly gave some thought to this: it spent some time at the start of its statement discussing the effect and the onset of her hearing difficulties. It concluded that the auditory problems could not be considered within the PIP claim as they had not subsisted for long enough to satisfy the qualifying period at the date of claim. Further, in considering the assessment itself it was found that there was no impediment to the appellant hearing the assessor and making the points that she wished to them. It found the assessor’s report to be comprehensive and helpful. It was not an error of law for the Tribunal to take that view and rely on the report.

#### **The apparent focus on the ear problems**

23. That brings me to point 2 in the grounds of appeal where it is argued that the Tribunal spent over-long considering the appellant’s ear problems, variously described as Viral Auditory Dysfunction and hyperacusis, to the detriment of her other medical problems.
24. The Tribunal’s statement analysed the evidence and set out its view that the onset of the ear conditions was March 2020, and that they were not mentioned during the telephone assessment. I understand why the Tribunal found it necessary to spend time on this issue: it was important in relation to the Tribunal looking at the possible effect of the auditory difficulties on the relevant descriptors, or whether it was precluded from doing so by reason of the qualifying period not being satisfied, and also in assessing the quality of the telephone assessment.
25. These were important preliminary points and were dealt with, at appropriate length because of their complexity, in the early part of the Statement of Reasons. I do not accept that there was concentration on this issue to the disadvantage of other points: the Tribunal has explained its findings in relation to the descriptors thoroughly.
26. As to any practical difficulties regarding hearing during that telephone conversation, the report makes no mention of any such difficulties, and it now seems common ground that none were put forward. It seems likely on the totality of the evidence that the Tribunal correctly concentrated on whether it was able to take the condition into account under the descriptors given the difficulties with the length of time it had been ongoing. Quite rightly, it decided it could not.

### **The relevance of the Universal Credit determinations**

27. It is argued that because the appellant was found within her Universal Credit claim to be unable to work the Tribunal's assessment appeared wrong.
28. The tests for PIP and Universal Credit where it is based upon disability are different, and there is no indication as to when the decision/s regarding entitlement to this benefit were made. They were not before the Tribunal, a fact of which the appellant and her then representative would have been aware because they had a copy of the document bundle. Had either thought the Universal Credit determinations may be of relevance they could have told the Tribunal, which could have called for their production. As it is, the Tribunal was only able to consider the evidence put before it, which did not include references to other assessments.
29. Whilst the Department must disclose all the relevant papers in its submission to the Tribunal, without knowledge of their being two healthcare professionals examining the appellant at about the same time, (albeit in relation to different benefits), there would be no reason to disclose.

### **Potential effects of the pandemic restrictions on evidence**

30. The pandemic and its restrictions on social interaction and, perhaps its effects on routine medical treatment, produces certain difficulties for a Tribunal assessment given the strict statutory criteria for considering only certain time periods and not others. Although Art 13(8)(b) of the Social Security (NI) Order 1998 instructs the Tribunal not to take into account circumstances that did not exist at the date of the decision under appeal, it may take later evidence into account where it sheds light on what the position was likely to have been at the relevant time.
31. The Tribunal used evidence from periods both before and after the relevant time for an award of this benefit, explaining clearly both why it had done so, and how it took those circumstances into account.
32. In relation to the issue of engaging with other people (Activity 9), for example, the Tribunal looked at the evidence of the appellant's abilities to mix at times when there were no, or less, restriction: this was both earlier and later than the date of the decision. Its finding that the appellant could engage socially, scoring no points, is based on the inconsistency between that evidence and the abilities set out in the PIP claim form (referred to in the Statement as the CQ), the appellant's report to the healthcare professional, and her oral evidence. The comment was made that her account of her abilities in this area "has varied on each occasion she has told it, and we are not satisfied that this variance is attributable to an inability to mix due to the pandemic."

33. In relation to cooking ability, the Tribunal referred once again to basic inconsistencies between the claim form and the healthcare professionals report regarding the extent to which the appellant cooked or prepared food. In its finding that she was likely to be able to prepare and cook food regularly without aids or assistance, the Tribunal placed reliance on what she had told the healthcare professional (rather than the claim pack or oral evidence) accepting that report as both contemporaneous and comprehensive. They took this approach also in relation to assessing difficulties dressing and undressing.
34. This inconsistency in the various sources of evidence is a feature of the Tribunal's approach to the individual descriptors; the Tribunal was entitled to (and did) rely on inconsistency to draw the inference that the appellant's actual abilities were greater than in the accounts in the claim form, or the oral evidence.
35. It is uncomfortable for litigants when findings are made that directly challenge a person's stated abilities, but it is the task of the Tribunal to test the evidence, and inconsistencies, where they are thought to be material rather than so slight as to be insignificant, may be of assistance in reaching conclusions of fact. The appellant, through her husband, puts forward her medical difficulties as perhaps causing inconsistencies in her statements. Whatever their cause, the Tribunal needs to assess the differing accounts, and come to view of the likely level of functional impairment. Here, the inconsistencies properly formed part of that analysis. I move on to discuss the other elements.
36. The Tribunal also heard evidence as to rapid deterioration of the appellant's ear problems. They were entitled to, and did, look on that as post decision deterioration, which they were not able to consider.
37. In the Statement, time is spent at various points observing that the medical evidence showed little complaint, or indeed engagement with medical services by the appellant either significantly prior to the PIP application, or closer to it. For example, it cites evidence from around 2010 in which the appellant rejected certain treatment in respect of both reported physical and mental health difficulties, and evidence from much closer to the date of application, where, similarly, she did not want to accept anti-depressant medication. The Tribunal found this rejection inconsistent with matters being as functionally difficult as it was now being told.
38. The overall view of the Tribunal was that the medical evidence didn't support the extreme level of disability put forward in the claim or subsequently. This was because the level of claimed functional impairment was inconsistent with what this Tribunal, with its medical expertise, described as low level clinical and medical management; it would have expected more specialist referrals and more aggressive treatment, or treatment options, had the appellant been complaining of the sort of difficulties they were now told she was experiencing.

39. As to the question of whether the tribunal fell into error of law in its assessment of Activity 4, washing and bathing, and in particular difficulties getting in and out of an unadapted bath or shower, the evidence was that the appellant showered independently, but had difficulties in the bath. The point was made in the reasoned decision that she was able to get out of a car slowly. A full reading of that passage shows that the car was really being used not as a direct comparison of the two physical activities, but as an indication of something the appellant did regularly, in light of her argument that she could really do very little indeed. The point was made (at page 6) in the context of remarks that she could indeed get in and out of the car, that she showered four times each week, that she had no specialist medical input, and took only over-the-counter pain relief, and that just 2 to 3 times a week. The Tribunal had previously observed that she had no Occupational Therapy input (which would assess the safety of the bathroom for example) and that an assessment about her fibromyalgia from 2010 had encouraged her to keep active.
40. The points made on the appellant's behalf must be seen against this background, the clearly stated view of the Tribunal that the claimed level of functional impairment was unlikely given the lack of significant medical input prior to the decision under appeal. This was key to the Tribunal's reluctance to accept the appellant's own evidence, and it's seeking a more objective source: it found that in the report of the healthcare professional.

### **In conclusion**

41. The task of the appeal Tribunal is to find the facts, and its findings will not be readily disturbed on an appeal on point of law: in *DWP-v-Information Commissioner and Zola [2016] EWCA Civ 758* (the Court of Appeal of England and Wales) Lord Justice Richards spoke about the respect to be accorded the factual findings of an expert tribunal and the Master of the Rolls agreed with that approach.
42. The Tribunal's Statement of Reasons was a thorough resumé of the procedural matters, the descriptors in dispute and its view in respect of each of them on the evidence before it. Its factual findings are both sufficient and sustainable on the evidence, and a clear explanation of the reasons for its view of the evidence is given.
43. It may have been unwise for reliance to be placed upon a comparison between getting out of the bath and getting out of the car, if indeed it was: the full context suggests that this was not either a direct comparison, nor the sole reason for the finding that the appellant could not score points in relation to bathing. In any event the point score for needing assistance in getting in and out of a bath would have made no difference to the adverse decision as only three points would have been scored for this difficulty, well short of the threshold for an award. It is that which makes such an error (if, indeed it was in error) not material: the word, in this context, is used in the sense of it being something that mattered at the end of the day.

44. Whilst the Statement of the Tribunals Reasons was comprehensive, dealing well with some complex issues and its deductions from the evidence, I would, finally, make a general point as to its structure, which I would ask other Tribunals to heed: the way it is set out has made it complicated to read and note up, and to reference in this decision, because it is largely without paragraph numbers. The separation of aspects of the decision into (as happened here) Conditions, Activities in Dispute and Findings of Fact, and its dealing with the various descriptors seriatim is not a substitute for continuous paragraph numbering, which enables the reader to reference the points made easily.
45. In my judgment the findings and the explanations of the tribunal are adequate, and no material error of law is made out.

A handwritten signature in black ink, appearing to read 'P Gray', written in a cursive style.

(signed): P Gray

Deputy Commissioner (NI)

8 June 2023