

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 8 September 2022

DECISION OF THE SOCIAL SECURITY COMMISSIONER

This appeal by the claimant is allowed. The decision of the Tribunal sitting remotely no 8 September 2022, under Tribunal Number NS/7334/19/02/D was in material error of law. I set it aside and make directions as to a rehearing.

Directions

- 1. The appeal will be reheard at an oral hearing by a fresh tribunal: the tribunal chair, medical and disability members will be different from the previous tribunal.**
- 2. The form of hearing will be the choice of the appellant, in so far as the Appeals Service is able to accommodate that preference. He or his representative will notify the preferred form of hearing within 7 days of this decision being issued, and, if necessary, directions will be made by a Tribunal Chairman.**
- 3. The Department will, within 30 days of the issue of this decision, file the appellant's Employment and Support Allowance (ESA) report that is the most recent prior to 30 July 2019 with the Appeals Service.**
- 4. Any further evidence from the appellant will be similarly submitted within the 30-day period. This is not to say that further evidence is required, but, if it is put forward it should be evidence that sheds light on the position at the dates the tribunal is considering; the statutory period that ends with the date of the decision under appeal, 30 July 2019.**

5. **My recent decision in *TMcC v Department for Communities (ESA)* [2023] NICom 22 will be annexed to this decision.**

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” and PIP are used).
2. The appellant submitted a claim for PIP on 11 March 2019. He cited problems linked to his health conditions that included anxiety and depression, migraines, gout, liver problems due to historic excessive alcohol consumption, Irritable Bowel Syndrome (IBS), acid reflux and damage to the thumb on his right hand.
3. On 31 May 2019 he attended a medical assessment, and on 30 July 2019 his claim was refused by the Departmental Decision Maker, who was of the view that no points were merited either for the activities of daily living, or in respect of mobilising. The mandatory consideration process followed, but the decision remained unchanged.
4. An appeal was lodged, and it came before the Tribunal sitting remotely on 8 September 2022. The long delay was due to the COVID 19 pandemic. Perhaps also for that reason, it was heard via a video platform. The Panel comprised of a legally qualified Chair, a medical doctor, and a member with experience of disability. At that hearing the appellant was assisted by a representative of Community Advice Ards and North Down. The appeal was refused, and the decision of the Department confirmed.
5. Following the issue of a statement of reasons, the appellant applied for leave to appeal, and it was granted by Ms Fitzpatrick, a salaried Tribunal Chair, on 2 February 2023.

Proceedings before the Commissioners

6. The appeal has proceeded by way of written submissions, and referral to me for further conduct.
7. The assistance of Nicky Roberts, of Community Advice Ards and North Down, has continued before me. The Department is represented by Ms Patterson. I am grateful to them both for their helpful submissions.
8. The Department supports the appeal, and I agree with the parties that there is a material error of law in the approach of the Tribunal. Accordingly, I am able to decide the case on the submissions before me and need not

offer the oral hearing that the appellant's representative sought at the outset.

The arguments of the parties

The appellant

9. The grounds of appeal were based squarely on the findings of the Tribunal having been heavily influenced by the demeanour of the appellant at the video hearing, from which it formed a positive view of his mental capacities in relation, in particular, to engaging with others. The Tribunal allowed no opportunity at the hearing for the appellant to comment on that view, an approach argued on the basis of a body of case law, to be erroneous.

The respondent

10. As I have said, Ms Patterson supports the appeal. Importantly (and appropriately) she concedes a critical issue, that the Statement of Reasons (the Tribunal's judgment) showed that the visual observations of the tribunal, and what it drew from them, were a factor that was taken into account in the conclusions.
11. She also agrees with the submission concerning the tribunal improperly taking into consideration matters which existed only after the decision under appeal; that is, against the prohibition in Article 13(8) of the Social Security (Northern Ireland) Order 1998. It is helpful to set that out here, as it will be referred to again.

(8) In deciding an appeal under this Article, an appeal tribunal –

(a) need not consider any issue that is not raised by the appeal; and

(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.

My approach

12. Given the high level of agreement between the parties I need deal only briefly with what I consider to be the legal errors to show how they might be avoided by the fresh tribunal.
13. I will outline the two factors that contributed to the error of law; they are linked by the feature of the reliance by the Tribunal on the appellant's demeanour at the hearing as a tool to evaluate his capabilities in relation to the PIP descriptors in issue.

Observations relied upon without giving the appellant an opportunity to comment

14. There are a number of cases on this, but I will concentrate on just two, each dealing with an important aspect of the issue.
15. In *ID v Secretary of State for Work and Pensions* [2015] UKUT 692 (AAC) Upper Tribunal Judge Markus QC summarised the existing law about reliance on observations evidence at a hearing thus:

From paragraph 21

- (a) A tribunal may take into account observations made at a hearing.
- (b) An observation must be relevant to an issue of fact that is before the tribunal and to the time of the decision under appeal and must be reliable as evidence of the claimant's disablement at the relevant time rather than only a snapshot on a particular day.
- (c) The tribunal must assess the significance of observations in the context of the evidence as a whole and it may be necessary to make further enquiries arising from or in relation to an observation.
- (d) A failure to allow a claimant to comment on a tribunal's observations may be a breach of the tribunal's inquisitorial function or of its duty to ensure that the parties have a fair hearing.
- (e) If an observation is used purely as confirmation of a conclusion that the tribunal would have reached anyway, there is no need for a tribunal to investigate further or for the claimant to have a chance to comment on it.

22. However, if an observation is one of the factors taken into account in reaching a conclusion, any failure in the tribunal's inquisitorial duty or violation of the right to a fair hearing will mean that the decision is wrong in law.

23. That is, in my judgment, properly asserted and conceded to be so here; accordingly for this reason alone the decision must be set aside.

Restrictions on the consideration of evidence under article 13(8)(b)

16. Article 13(8)(b) of the Social Security (NI) Order 1998 directs the Tribunal not to take into account circumstances that did not obtain (meaning in this context, exist) at the date of the decision under appeal; it may, however, take later evidence into account to shed a light on what the position was likely to have been at the relevant time, which is the statutory period prior to the decision: *BMcD v DSD (DLA)* [2011] NICom 175; [2013] AACR 29, a decision of a Tribunal of Commissioners in Northern Ireland.

17. The decision under appeal was taken as long ago as 30 July 2019. Due to the delays caused to many services by the COVID 19 pandemic, the hearing before the Tribunal occurred some two years later, in September 2022.
18. The Tribunal referred to the appellant's demeanour at that hearing in its reasons without apparent caution about the time lag; nor is it recorded that the tribunal asked the appellant to explain or compare his mental state at about the time of the decision and the hearing. There must, in those circumstances, be a likelihood either that the Tribunal did take impermissible matters into account, or that there is a real perception of it having done so rendering its decision unfair and unsound as a matter of law.
19. Commissioner Stockman made some pertinent remarks in *SM v Department of Communities (PIP)* [2021] NICom 6 at [36] and [37]:

36...In the context that a tribunal may not consider circumstances not obtaining at the date of the decision under appeal is made (by Article 13(8)(b) of the Social Security (NI) Order 1998) recording observations of an appellant at hearing and placing weight on them is something of a hostage to fortune.

37...If relying on observations at hearing, it needed to ascertain that they were equally applicable at the date of the decision under appeal. Making observations that it considered consistent with the HCP report of November 2016 was not enough. In order to rely on them, fairness required those observations to be put to the appellant for comment.

Other issues raised before me, and issues for the fresh Tribunal

20. In view of my decision on the major points, the others fall away and will be subsumed at the fresh hearing: that may mean that they are dealt with in the usual course of things, but in relation to some issues that they simply don't arise again, or the tribunal is sufficiently forewarned as to pre-empt and confront them with the parties as matters for discussion at the outset.
21. Other matters may need to be thought about prior to the hearing, and the issue is raised by the appellant's representative that the previous ESA reports should be produced by the Department. Although I am inclined to the view expressed by Ms Patterson, that the ESA reports are unlikely to be of material assistance, I am directing that the Department produces the most proximate report prior to the decision under appeal of 30 July 2019, if it is still available. That is because it is a matter for the tribunal to decide upon its relevance, and if it thinks that it may be relevant and wishes to obtain it, then there will be further delay in this already overlong decision making process.
22. To explain that approach I also direct that my recent decision in *TMcC v Department for Communities (ESA)* [2023] NICom 22 is annexed to this

decision. In it I set out and explain the principles of potential reliance on prior medical reports from adjudication of the same or other benefits, in case law starting from *JC v Department for Social Development (IB)* [2011] NICom 177; [2014] AACR, the decision of a Tribunal of NI Commissioners. I show how that important decision has been refined and interpreted in other cases, and explain that, in the final analysis it will be for the tribunal to decide on the relevance, or the extent of any relevance, in the circumstances of each case. The points that I make about the legal position, as well as the onus on the tribunal to explain its determination on the issue, may be of assistance.

23. As in all cases in which there is significant delay between the date of the decision and the date of the appeal hearing, the Tribunal needs to approach any difficulties with its usual common sense, and, importantly, explain its approach if reasons are requested. In recent times there have been problems assessing difficulties encountered engaging socially with other people, because social mixing was not taking place during the pandemic lockdowns, and perhaps more inferences were required from other behaviours or other periods to shed the necessary light on what the position was likely to have been at the relevant time. To explain the circumstances and how the findings were made in the light of such difficulties becomes more important, as less can be inferred by the reader about what examples the Tribunal used.
24. Finally, I mention the point that the tribunal did not fully investigate or apply the proper tests to the application of descriptor 9 engaging with other people, and in particular the contention that he needed the assistance of his mother in social situations. The UK Supreme Court has adjudicated on matters affecting the applications of descriptor 9 in the case of *Secretary of State for Work and Pensions v MM (Scotland)* [2019] UKSC 34; [2019] AACR 26. In that case Lady Black gave the judgment of the Court, and, although that is, as always, the preferred source, the following may be of help.
 - (i) to establish what help the particular person needs - not the help the person is actually receiving (although the one may inform the other) or the support a person would like to have, but concentrating on the type of support they need to enable the activity to take place
 - (ii) when deciding what level of support (the 2 or the 4 point descriptors) is needed, to exclude merely the sort of confidence boosting and reassurance that occurs in many close relationships by focussing on the
25. The Secretary of State conceded that "prompting" could also qualify as "support": it was necessary to look at what the difference is between assistance that would satisfy 9c rather than 9b; it will turn upon the need for the person giving it to be trained or experienced in that regard. The Secretary of State also confirmed before the Court that the training and experience required could be that of family or friends, so the starting point as to whether b or c applies is

twin requirements of necessity and relevant training or experience: to qualify under 9c the claimant has to need support from someone who is not just familiar with them but who is also experienced in assisting engagement in social situations: it is the training/experience of the helper upon which the claimant depends in order to enable the face-to-face engagement with others to take place, not simply the close and comforting relationship that may exist between the claimant and helper.

In conclusion

26. I finish by reminding the claimant that success before me on the legal issues is not a pointer to success at the tribunal, which is deciding on the facts, and applying to law to them.

(signed): P Gray

Deputy Commissioner (NI)

19 September 2023