

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 9 May 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal sitting at Belfast.
2. For the reasons I give below, I grant leave, set aside the decision of the appeal tribunal under Article 15(7) of the Social Security (NI) Order 1998 and I remit the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The applicant claimed personal independence payment (PIP) by telephone from the Department for Communities (the Department) from 4 May 2017 on the basis of needs arising from post-traumatic stress disorder (PTSD), throat cancer, angina and depression. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 26 May 2017. He was asked to attend a consultation with a healthcare professional (HCP) on 25 July 2017 and a consultation report was received by the Department. On 26 September 2017 the Department decided that the applicant did not satisfy the conditions of entitlement to the daily living component of PIP, but did satisfy the conditions of entitlement to the standard rate of the mobility component from 4 May 2017 to 24 July 2020. The applicant requested a reconsideration of the decision, and he was notified that the decision had been reconsidered by the Department but not revised. He appealed, but waived his right to an oral hearing of the appeal.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 9 May 2018 the tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 8 August 2018. The applicant 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 9 September 2018. On 5 October 2018 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The applicant submits that the tribunal has erred in law on the basis that it did not accept that he suffered from PTSD or depression.
6. The Department was invited to make observations on the applicant's grounds. Ms Coulter of Decision Making Services (DMS) responded on behalf of the Department. Ms Coulter submitted that the tribunal had erred in law and indicated that the Department supported the application.

The tribunal's decision

7. 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, containing the questionnaire completed by the applicant and a consultation report from the HCP. It had sight of the applicant's medical records with his consent, as directed by an LQM. The applicant had waived his right to an oral hearing. However, an LQM had directed an oral hearing. Nevertheless, the applicant did not attend the oral hearing and the tribunal decided to proceed in his absence.
8. The tribunal addressed itself to each of the ten areas of daily living activity and the two areas of mobility activity. It awarded 2 points for 'Preparing food' on the basis of needing to use an aid or appliance (descriptor 1(b)). It awarded 2 points for 'Washing' on the basis of needing to use an aid or appliance (descriptor 4(b)). It awarded 2 points for 'Managing toilet needs' on the basis of needing to use an aid or appliance (5(b)). However, it found no other applicable daily living descriptors. It awarded 10 points for 'Moving around' (2(d)). It found no other applicable descriptors on the evidence before it.

Relevant legislation

9. 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.

10. 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.

Assessment

11. 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.
12. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
13. 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.
14. The applicant submits that the tribunal found that he did not suffer from PTSD or depression. This is not a sustainable submission. It is evident from the record of the tribunal's proceedings that it noted the applicant's comments about his PTSD and depression in the PIP2 questionnaire. It had further evidence of this in the HCP's report and presumably from the GP records – although this is not specified. On the evidence before it, the tribunal found that the applicant had no specialist mental health input or mental health medication. However, while it may have drawn some conclusions about the severity of those conditions from the level of treatment, it did not find that they were not present. The tribunal was concerned with the functional effects of the conditions on the applicant and it focussed its conclusions on those. It had no need to decide whether or not a particular medical condition was correctly diagnosed or present and it did not make any such decision. I do not accept that the tribunal has arguably erred in law on the basis submitted by the applicant.
15. However, Ms Coulter for the Department has made submissions in the applicant's interests to the effect that the tribunal has erred in law on alternative grounds.

16. She referred to the decision of Upper Tribunal Judge Bano in *SF v Secretary of State for Work and Pensions* [2016] UKUT 543. She cited paragraph 6, which reads:

“As Judge Mark pointed out in *AM v Secretary of State for Work and Pensions* [2015] UKUT 215 (AAC), the term ‘engage socially’ does not appear anywhere else in Schedule 1 to the PIP Regulations. However, descriptor 9c applies to claimants who need ‘social support to be able to engage with other people’ and ‘social support’ is defined in paragraph 1 of Schedule 1 as ‘support from a person trained or experienced in assisting people to engage in social situations’. Descriptor 9c is therefore concerned with the support required by claimants in social situations. Although it applies to claimants who need a higher level of support in such situations than mere prompting, there is no reason to suppose that descriptors 9b and 9c are concerned with a claimant’s ability to engage with other people in different factual contexts. That construction of Activity 9 explains why ‘engage socially’ is defined in Schedule 1, and without wishing to express a concluded view on the issue in a case in which it has not been argued, I therefore consider that the whole of PIP Activity 9 is concerned with a claimant’s ability to engage with other people face to face in social situations. It would follow that in all cases in which Activity 9 is in issue decision makers should apply the definition of ‘engage socially’ in Schedule 1 and should consider a claimant’s ability to interact with others in a contextually and socially appropriate manner, the claimant’s ability to understand body language, and the claimant’s ability to establish relationships in a social context”.

17. Ms Coulter submitted that, whereas the tribunal had referred to the applicant’s ability to attend appointments and see family and neighbours when they call to the house, its reasons did not deal with his statement that he could not speak to people he didn’t know. Ms Coulter submitted that the tribunal did not give adequate findings on the applicant’s ability to engage with people unfamiliar to him, and as such its decision was erroneous in law.
18. Ms Coulter further referred to evidence before the tribunal that the applicant had experienced blackouts and falls. Whereas the tribunal had addressed the activity of planning and following a journey from the point of view of the applicant’s mental health, she submitted that the tribunal had erred by failing to address the issue of whether the applicant could plan and follow a journey safely for the reason that he was liable to falls.

19. I consider that there is merit in the first of the submissions advanced by Ms Coulter. I consider that it is appropriate in the circumstances to grant leave to appeal and to set aside the decision of the appeal tribunal under Article 15(7) of the Social Security (NI) Order 1998, without making a formal finding that the tribunal has erred in law.
20. I believe that the second submission advanced by the Department is one that requires more detailed analysis, and I trust that a suitable case will present itself in future to test that submission.
21. I set aside the decision of the appeal tribunal and I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

25 June 2019