

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 20 July 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. The claimant's appeal is allowed, both parties having expressed the view that the decision of the Appeal Tribunal sitting at Downpatrick Courthouse on 20 July 2018 (under reference NW/00908/17/02/D) was erroneous in point of law. Accordingly, under the powers conferred on me by Article 15(7) of the Social Security (Northern Ireland) Order 1998, I allow the appeal, set aside the decision appealed against and refer the case to a differently constituted Appeal Tribunal for re-hearing and determination.
2. The claimant – the Appellant in these proceedings – must appreciate that the issue of his entitlement (if any) to personal independence payment (PIP) remains to be decided by a new Appeal Tribunal. Just because this appeal to the Social Security Commissioner has succeeded on a point of law does not mean that the appellant's substantive PIP appeal itself will succeed on the facts before the new Appeal Tribunal. That remains to be decided.

The background

3. On 28 July 2016 the Appellant, whose main medical problems are alcohol dependency, depression and musculoskeletal problems, made a claim for PIP. On 17 November 2016 a disability assessor (a nurse) conducted a PIP assessment at the Appellant's home. Following her report, on 5 December 2016, the Social Security Agency's decision maker reviewed the evidence to hand and decided that the Appellant was not entitled to either component of PIP. This was because the Appellant was scored at nil points in respect of each component. On 14 February

2017 the Agency confirmed that decision on the Appellant's request for a mandatory reconsideration. The Appellant lodged an appeal on 9 March 2017, stating on the notice of appeal that he was disagreeing with the nurse's report. Following a parallel complaint to Capita, a second PIP assessment was carried out, again at the Appellant's home and again by a nurse disability assessor (on 29 June 2017). The Agency subsequently confirmed the disallowance decision.

The Appeal Tribunal decision and grounds of appeal to the Commissioner

4. The Appeal Tribunal heard the Appellant's appeal at Downpatrick on 20 July 2018. The Law Centre, the Appellant's representative, put in a written submission arguing that virtually all the PIP activities were in issue. However, the Appeal Tribunal confirmed the substance of the outcome of the Agency's decision, although it differed slightly on the details. The Appeal Tribunal awarded 4 points for daily living activities 1(d) [preparing food] and 4(b) [washing and bathing], but this was plainly still not enough to meet the required threshold of 8 points. The Tribunal also confirmed the score of nil points for the mobility descriptors. As a result, the substance of the Department's decision was confirmed and the Appellant's appeal disallowed.
5. In the application for leave to appeal to the Social Security Commissioner, the Appellant's representative argued that the Tribunal had failed to apply the appropriate standard of "safely", and the need for supervision when considering the various activities, as well as misapplying the requirement that a descriptor be satisfied for the "majority of the time". The Appeal Tribunal's Legally Qualified Member granted leave to appeal on 25 October 2018 on that basis.
6. Mr Edward Arthurs, the Department's representative, supports the appeal in a detailed submission. He accepts that the Appeal Tribunal referred to the requirement in regulation 4 of the Personal Independence Payment Regulations (Northern Ireland) 2016, namely the criteria that activities can be undertaken safely, to an acceptable standard, repeatedly and in a reasonable time without the need for supervision. His argument, in summary, is that the Appeal Tribunal failed thereafter to consider whether there was a real possibility of harm occurring should the Appellant lose consciousness. The Appeal Tribunal did not make it clear it had considered whether the risk associated with falls occurring was a real possibility, whether or not it was a risk for the majority of the time. This could be relevant to moving around as well as certain daily living activities, where a tendency to black out could be a danger to the Appellant or others. As such, Mr Arthurs submits that the Appeal Tribunal erred in law, relying on authorities such as *RJ, GMcL and CS v Secretary of State for Work and Pensions (PIP)* [2017] AACR 32, a Great Britain decision followed and applied in Northern Ireland by the Chief Commissioner in *AG v Department for Communities (PIP)* NICom 51.

7. I agree with that analysis and accordingly direct that the issue of whether the claimant satisfies the conditions of entitlement for PIP is to be looked at by way of a complete re-hearing, taking account of the relevant legislation and this decision. Unless otherwise directed, the Appellant or his representative must ensure that any further written evidence is filed with the Appeal Tribunal no less than 21 days before the hearing date. The Appeal Tribunal will need to make full findings of fact on all points that are put in issue by the appeal. If the Tribunal rejects the Appellant's evidence, it must provide a sufficient explanation why it has done so and it must in any event give adequate reasons for its conclusions. The Tribunal must not take account of circumstances that were not obtaining at the time of the decision under appeal, which was taken on 5 December 2016. However, the Tribunal may have regard to subsequent evidence or subsequent events for the purpose of drawing inferences as to the circumstances obtaining at that time: see the decisions of the Commissioner in Great Britain under case references *R (DLA) 2/01* and *R (DLA) 3/01*. The above directions are subject to any further directions which may be given by the Appeal Tribunal.
8. Finally, I suggest that the Appeal Tribunal will find the guidance from Great Britain of Upper Tribunal Judge Hemingway in *SD v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 310 (AAC) of some considerable assistance, given the legislation is identical in all material respects. This case also concerned a claimant with alcohol problems.

“My consideration of the issues

13. There have been a number of important decisions concerning the approach to be taken to persons suffering from chronic alcoholism and other forms of addiction in the context of disability living allowance and employment and support allowance. I have in mind, in particular, *R(DLA) 6/06*; *JG v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 37 (AAC) and *SD v Secretary of State for Work and Pensions (ESA)* [2016] UKUT 100 (AAC).

14. In *R(DLA) 6/06*, a decision made in the context of DLA by a Tribunal of Social Security Commissioners it was decided, amongst other things, that whilst the transient and immediate effects consequent upon a person choosing to consume too much alcohol ought not to be taken into account in determining entitlement. That is because a person exercising such a choice could reasonably be expected to avoid any need for attention or supervision by controlling alcohol consumption. But, alcohol dependency is a medical condition and a person who cannot realistically stop consuming alcohol to excess because of a medical condition could reasonably be said to be suffering from a disability and to require attention,

supervision or other help contemplated by legislation relating to that particular benefit. It is worth noting that the Tribunal of Commissioners had received expert evidence, which it accepted, concerning the nature of alcohol dependence. In its summary of that evidence it said:

“18. Alcohol dependence is a discrete illness, well recognised by the medical professions and manuals of diagnostic criteria. Alcohol dependence falls within the category of Substance Dependence in the current Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM IV). The illness is diagnosed on the basis of a constellation of markers, as follows:

‘A maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same 12-month period

(1) tolerance, as defined by either of the following:

(a) a need for markedly increased amounts of the substance to achieve intoxication or desire effect

(b) markedly diminished effect with continued use of the same amount of the substance

(2) withdrawal, as manifested by either of the following:

(a) the characteristic withdrawal syndrome for the substance ...

(b) the same (or a closely related) substance is taken to relieve or avoid withdrawal symptoms

(3) the substance is often taken in larger amounts or over a longer period than was intended

(4) there is a persistent desire or unsuccessful efforts to cut down or control substance use

(5) a great deal of time is spent in activities necessary to obtain the substance (eg visiting multiple doctors or driving long distances), use the substance (eg chain-smoking), or recover from its effects

(6) important social, occupational, or recreational activities are given up or reduced because of substance use

(7) the substance use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance (eg current cocaine use despite recognition of cocaine-induced depression, or continued drinking despite recognition that an ulcer was made worse by alcohol consumption).'

The definition of Dependence Syndrome in the current equivalent World Health Organisation manual (ICD10) largely corresponds."

15. It went on to say:

"33. Rather than a clear cut distinction between dependence and choice, in our judgment it is more helpful to think in terms of the degree of self-control that is realistically attainable in the light of all of the circumstances, including the claimant's history and steps that are available to him to address his dependence. A person who cannot realistically stop drinking to excess because of a medical condition and cannot function properly as a result can reasonably be said both to be suffering from disablement and to require any attention, supervision or other help contemplated by the legislation that is necessary as a consequence of his drinking. We can see no reason why the effects of being intoxicated should not be taken into account

in determining his entitlement to the care component of DLA ...”

16. In *JG* it was decided, amongst other things, that the summary of the expert evidence in *R(DLA) 6/06* should be adopted by decisions makers and tribunals in employment and support allowance (ESA) cases as representing the current mainstream medical view. Mr Whitaker does not suggest that any approach different to that ought to be taken in the context of PIP. I am sure he is right not to do so. So, it follows that alcohol dependency, if accepted or if established by the evidence, will amount to a “physical or mental condition”, specifically a mental one, as the phrase is used at sections 78 and 79 of the Welfare Reform Act 2012. Difficulties caused by alcohol dependency, therefore, may be relevant to the question of whether or not points are to be scored under the daily living and mobility activities and descriptors though it seems to me, in general terms, that it is more likely that the daily living descriptors will have relevance.

17. The tribunal, as already noted, did find that the claimant was dependent upon alcohol and did, I accept, implicitly decide that such dependency amounted to a “mental condition”. So, that opened the gateway to potential entitlement because the initial threshold test was met.

18. The tribunal did, though, then go wrong in effectively overlooking any possible consequences of the alcohol dependency and any intoxication when assessing whether or not any of the descriptors were satisfied. Mr Whitaker accepts that it was guilty of that significant omission. Its failure to do so clearly did amount to an error of law and, indeed one which, had it not been made might (I do not say would) have led to a different result. So, the tribunal’s decision does have to be set aside.

19. There is then the question of whether I should remit or re-make the decision myself. The Secretary of State has invited me to remit. I suspect that the claimant would like me to re-make the decision myself albeit that he has not actually said so. I appreciate he has been waiting a long time for this decision. However, the absence of factual findings concerning such as the severity of the addiction, the frequency and degree of intoxication within each day and the impact upon the ability to perform the PIP functions safely, to an acceptable standard, repeatedly and within a reasonable time period (see

Regulations 4(2A) and 4(4) of the PIP Regulations) does mean that further fact finding to a substantial degree is needed. I suppose I could hold a hearing and hear evidence from the claimant myself but neither party has asked for a hearing before the Upper Tribunal and it seems to me that if there is to be such a hearing for fact finding purposes that ought properly to be before the tribunal which is an expert fact finding body and which will have available to it a range of expertise through the composition of its panel. So I have concluded that remittal to a new tribunal is the appropriate course.

Some matters for the new tribunal

20. The new tribunal will not be limited to the grounds upon which I have set aside the tribunal's decision. It will consider all aspects of the case, both fact and law, entirely afresh. Neither will it be limited to considering only the evidence which was before the previous tribunal. It will decide the case on the basis of all the evidence before it and which may include additional documentation as well as oral evidence. As to that, given the need for further fact finding, the claimant would be well advised to attend the oral hearing as he did the previous one.

21. Of course, it does not follow that merely because a claimant is dependent upon alcohol and therefore has a "mental condition", that that claimant will be unable to perform any of the various tasks or functions relevant to PIP. As was mentioned in R(DLA) 6/06, for example, there is the concept of the "functioning alcoholic", who might be dependent yet still hold down a job. Such a person might not meet the point scoring requirements under PIP even for a part of any day. Matters will vary from one individual to another and careful fact-finding on the part of the new tribunal will be necessary. Also, as Mr Whitaker correctly points out, whilst alcohol dependence is relevant to PIP every much as it is to DLA, the actual criteria for satisfaction of an award are much different.

22. There is then Mr Whitaker's additional point regarding *TR*, which he makes in the context of guidance which might be given to the new tribunal upon remittal. As I understand it, he is not challenging the correctness of the general approach taken in *TR* but is arguing that the approach has to be refined, in the manner he suggests, in certain substance abuse cases.

23. In *TR* I said:

“32. ... it seems to me that for a descriptor to apply on a given day then the inability to perform the task or function must be of some significance, that is to say something which is more than trifling or, put another way, something which has some tangible impact upon a claimant's activity and functioning during a day but not more than that ...”

24. I would accept that, to use Mr Whitaker's example, an alcoholic claimant who only becomes significantly intoxicated at the very end of a day will have had, by that time, an opportunity to perform many of the PIP functions and will, in all probability have actually done so. So, to stay with the example of preparing and cooking food, such a claimant might have prepared and cooked as many meals as he reasonably required at appropriate and reasonable stages of the day. In such circumstances, an inability to prepare and cook food during the closing moments of a day in circumstances where, in any event, that claimant would not wish to or need to do so would not lead to the scoring of points. The position might be different though with respect to such as toileting and undressing, which it might reasonably be thought would be performed at the very end of a claimant's active day but it would, I suppose, take an unusual degree of inebriation to render an otherwise healthy person incapable of attending to those sorts of tasks for himself purely on account of that inebriation. So, in appropriate cases, findings may have to be made as to whether the effects of intoxication cause such significant impairment as to render the claimant incapable of fulfilling any relevant tasks or functions at all (and if not the process may stop there); when if there is such impairment it would typically take hold during a day; which functions would be impaired; which activities and descriptors would be in issue; and whether any limited period of incapability through intoxication would properly lead to a conclusion that that incapacity is capable of having a tangible impact upon the claimant's activity and function during a day.

25. I appreciate that fact finding of the nature indicated above is difficult. I do not wish to make things any more difficult for busy tribunals than they already are. But a number of such cases might be relatively straightforward either because it is obvious an alcohol dependent claimant is nevertheless functioning in the manner referred to above or because it is obvious that intoxication

takes hold and has an impact of significance at an early stage in any given day. Where the matter is not clear cut a tribunal will simply have to do its best, take a broad view of the evidence where appropriate and rely upon its expertise.”

9. I also reiterate that the ultimate decision on the re-hearing of this appeal is entirely a matter for the Appeal Tribunal. The fact that this appeal to the Commissioner has been allowed on a point of law should not be taken as any indication either way as to the likely outcome of the re-hearing on the facts.

(signed): N J Wikeley

Deputy Commissioner (NI)

22 July 2019