

**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 19 July 2018

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. As will be explained in greater detail below, both parties have expressed the view that the decision appealed against was erroneous in point of law.
2. Accordingly, pursuant to the powers conferred on me by Article 15(7) of the Social Security (Northern Ireland) Order 1998, I allow the appeal, I set aside the decision appealed against and I refer the case to a differently constituted tribunal for determination.
3. It is imperative that the appellant notes that while the decision of the appeal tribunal has been set aside, the issue of her entitlement to Personal Independence Payment (PIP) remains to be determined by another appeal tribunal.
4. I direct that the parties to the proceedings and the newly constituted appeal tribunal take into account the following:
  - (i) the decision under appeal is a decision of the Department, dated 3 October 2017, which decided that the appellant was not entitled to either component of PIP from and including 15 May 2017;
  - (ii) the Department is directed to provide details of any subsequent claims to PIP and the outcome of any such claims to the appeal tribunal to which the appeal is being referred. The appeal tribunal is directed to take any evidence of subsequent claims to PIP into account in line with the principles set out in *C20/04-05(DLA)*;

- (iii) it will be for both parties to the proceedings to make submissions, and adduce evidence in support of those submissions, on all of the issues relevant to the appeal; and
- (iv) it will be for the appeal tribunal to consider the submissions made by the parties to the proceedings on these issues, and any evidence adduced in support of them, and then to make its determination, in light of all that is before it.

### **Background**

5. On 3 October 2017 a decision maker of the Department decided that the appellant was not entitled to PIP from and including 15 May 2017. Following a request to that effect and the receipt of additional evidence the decision dated 3 October 2017 was reconsidered on 13 November 2017 but was not changed. An appeal against the decision dated 3 October 2017 was received in the Department on 11 December 2017.
6. The appeal tribunal hearing took place on 19 July 2018. The appellant was present and was represented. There was a Departmental Presenting Officer present. The appeal tribunal allowed the appeal in part making an award of entitlement to the standard rate of the mobility component of PIP for a three year period from 1 November 2017 but disallowing entitlement to the daily living component. The appeal tribunal did apply descriptors from Part 2 of Schedule 1 to the Personal Independence Payment Regulations (Northern Ireland) 2016 ('the 2016 Regulations') which the decision maker had not applied. The score for these descriptors were insufficient for an award of entitlement to the daily living component of PIP at the standard rate – see article 83 of the Welfare Reform (Northern Ireland) Order 2015 and regulation 5 of the 2016 Regulations.
7. On 14 January 2018 an application for leave to appeal to the Social Security Commissioners was received in the Appeals Service (TAS). On 5 February 2019 the application for leave to appeal was refused by the Legally Qualified Panel Member (LQPM).

### **Proceedings before the Social Security Commissioner**

8. On 13 March 2019 a further application for leave to appeal was received in the office of the Social Security Commissioners. On 1 April 2019 observations on the application for leave to appeal were requested from Decision Making Services ('DMS'). In written observations dated 29 April 2019, Mr Arthurs, for DMS, supported the application for leave to appeal on one of the grounds submitted on behalf of the appellant. Written observations were shared with the appellant on 29 April 2019.
9. The case became part of my workload on 22 April 2020. On 6 May 2020 I accepted the late application for special reasons. On 20 May 2020 I granted leave to appeal. In granting leave to appeal, I gave, as a reason

that it was arguable that the appeal tribunal has failed to exercise its inquisitorial role in respect of an issue arising in the appeal. On the same date I determined that an oral hearing of the appeal would not be required.

### **Errors of law**

10. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
11. In *R(I)2/06* and *CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:
  - “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
  - (ii) failing to give reasons or any adequate reasons for findings on material matters;
  - (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
  - (iv) giving weight to immaterial matters;
  - (v) making a material misdirection of law on any material matter;
  - (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

### **Analysis**

12. The agreed error of law with which I concur was summarised by Mr Arthurs in his written observations on the application for leave to appeal as follows:

‘In its Record of Proceedings the Tribunal has recorded the following statement by Mr McLaughlin:

*“The main contention is that the medical evidence is there – the main area is that because of the overall medical condition he needs supervision and needs to be aided. Also take into consideration Dr McM’s letter of 23 March 2013 – he can’t be left unsupervised. CMcG’s letter of October 2017.”*

In the letter from Dr McM of 23 March 2013, in paragraph 2, the following is recorded:

*“While he is having an episode he is unaware of his surroundings and events. He suffers from amnesia following these events. His mother tells me that he suffers from urinary incontinence during these attacks.”*

Also the Tribunal, held access to several references to it including the PIP2 application form and the Mandatory Reconsideration request.

The Tribunal’s consideration of the activity *Managing Toilet Needs or Incontinence* is limited to the following paragraph in its reasons:

*“The Tribunal considered the applicability of the other activities under Daily Living Component but did not identify any evidence to support an award of points under any other activities. Accordingly the Tribunal awarded 5 points under any other activities. Accordingly the Tribunal awarded 5 points under the Daily Living Component of Personal Independence Payment.”*

The Tribunal has categorically stated it cannot find any evidence to support an award under those activities however the issue of incontinence was referred to several times in information that was available to the Tribunal. I do not believe that the representative’s failure to identify activity 5 as sought after means the Tribunal could bypass this issue.’

13. I agree with Mr Arthurs’ careful analysis. Mr McLaughlin was the appellant’s representative at the hearing. I have observed that in the record of proceedings for the appeal tribunal hearing, the following is noted:

‘The Appellant’s representative asked the Tribunal to look specifically at taking nutrition, monitoring therapy or monitoring a health condition, communicating verbally and engaging with other people face to face. The representative wishes to rely on the points awarded by the Department under the activities of preparing food and washing and bathing.’

14. Mr McLaughlin is a very experienced tribunal representative. Ordinarily, I would have little difficulty in confirming that an appeal tribunal would be entitled to rely on the submissions made by a representative with this degree of understanding of the conditions of entitlement to social security benefits and tribunal practice and procedure even where those submissions sought to narrow the appeal tribunal’s jurisdiction. What is telling, however, is that appeal tribunal has stated, in categorical terms that it **did** give consideration to the remaining activities in Part 2 of Schedule 1 to the 2016 Regulations but, as was observed by Mr Arthurs, **did not identify any evidence to support an award of points under any other activities**. As Mr Arthurs submits, there was, in fact, sufficient evidence to suggest the potential application of activity 5 in Part 2 of Schedule 1 to the 2016 Regulations.
15. As both parties have expressed the view that the decision appealed against was erroneous in point of law, pursuant to the powers conferred on me by Article 15(7) of the Social Security (Northern Ireland) Order 1998, I allow the appeal, I set aside the decision appealed against and I refer the case to a differently constituted tribunal for determination.

(signed): K Mullan

Chief Commissioner

6 July 2020