

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 23 October 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference DP/824/20/03/D.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal under Article 15(8)(b) of the Social Security (NI) Order 1998. I set aside the decision of the appeal tribunal and I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The appellant had previously been awarded disability living allowance (DLA) in childhood from 22 January 2008, most recently at the low rate of the mobility component and the middle rate of the care component from 24 July 2015 to 14 January 2020. As he reached the age of 16, his award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015. Therefore, he was invited to claim personal independence payment (PIP) from the Department for Communities (the Department). He duly claimed from 1 August 2019 on the basis of needs arising from asthma, ectopic eczema, allergic reactions, persistent rhinitis, reading difficulties and a bulge under his right knee.
4. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 3 October 2019. His father was appointed to act on his behalf by the Department. He asked for evidence relating to his previous DLA claim to be considered. The

appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 29 November 2019. On 11 December 2019 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 1 August 2019. The appellant requested a reconsideration of the decision, submitting further evidence. He was notified that the decision had been reconsidered by the Department but not revised. His appointee appealed.

5. The appeal was considered at a hearing on 23 October 2023 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 13 December 2023. The appellant 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 26 January 2024. On 23 February 2024 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant, represented by Ms McCabe of Law Centre NI, submits that the tribunal has erred in law by:
 - (i) Having regard to evidence that post-dated the decision under appeal.
 - (ii) Failing to give adequate reasons for its decision on Reading and Making budgeting decisions.
 - (iii) Failing to give adequate reasons for its decision on Planning and following journeys.
 - (iv) Providing an unintelligible record of proceedings.
 - (v) Procedural unfairness, on the basis that one of the tribunal members fell asleep during the hearing.
7. The Department was invited to make observations on the appellant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted that the tribunal had materially erred in law. He indicated that the Department supported the application.

The tribunal's decision

8. 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 PIP2 questionnaire completed by the appellant and a consultation report from the HCP. It had access to the appellant general practitioner (GP) records,

an article on food allergies, a document from the Food Standards Agency and a written submission on behalf of the appellant. He attended the oral hearing and gave oral evidence, accompanied by his father and represented by Ms Corr of Law Centre NI. The Department was not represented.

9. The tribunal accepted that the appellant suffered from asthma, various allergies and eczema. No restriction in function was attributed to the bulge behind his right knee. It noted that he took the bus to school independently, walked with a normal gait, could sit, stand and use his arms without limitation. His mental state was normal. He engaged in football, rugby and cross-country running in PE. Accordingly, it found that he did not have a severe restriction arising from his asthma, albeit observing that he had two courses of steroids in the 12 months to February 2019. It noted the risk of anaphylactic shock arising from allergies, and observed that he used an EpiPen in July 2022. It accepted that he needed supervision in relation to food and nutrition, awarding 2 points under activity 1.d. While accepting that he suffered from the condition, it found no relevant restrictions arising from eczema, but found some need for supervision and assistance with applying creams, awarding 1 point under activity 3.b.iii. v Observing that he was able to go to college to pursue studies and to gain employment, it found no reason why he could not cope independently. Having awarded 3 points only for daily living, it disallowed the appeal.

Relevant legislation

10. 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.
11. 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.
12. Additionally, by regulation 4, certain other parameters for the assessment of daily living and mobility activities, as follows:
 - 4.—(1) For the purposes of Article 82(2) and Article 83 or, as the case may be, 84 whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment taking account of relevant medical evidence.

(2) C's ability to carry out an activity is to be assessed—

(a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or

(b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.

(3) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—

(a) safely;

(b) to an acceptable standard;

(c) repeatedly; and

(d) within a reasonable time period.

(4) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(5) In this regulation—

“reasonable time period” means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity;

“repeatedly” means as often as the activity being assessed is reasonably required to be completed; and

“safely” means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity.

Assessment

13. 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.
14. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
15. 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.

16. In response to the appellant's grounds, Mr Killeen for the Department offered support in respect of the question of whether the appellant would have been capable of managing budgeting decisions at the date of the decision under appeal. He further observed that, while he had no evidence and therefore no view on the allegation that a member of the panel fell asleep, if this had occurred it would have affected the fairness of the hearing.
17. As the Department offers support for the application for leave to appeal on one of the grounds, I consider that it is evident that the ground is arguable. Therefore, I grant leave to appeal.
18. A specific allegation in the grounds of appeal had been made by the appellant's representative to the effect that she observed the head of one of the panel members "drop forward and jerk back up". This is a matter of fact and would normally require a measure of investigation by the Commissioner before it could be resolved. However, following a complaint to the President of Appeal Tribunals, this particular issue was investigated under the relevant Code of Practice. A copy of the letter indicating the President's response to the complaint was subsequently provided to me by the appellant. A copy was duly passed to the Department for its observations.
19. The President of Appeal Tribunals had concluded, following the complaint, that the LQM "may have lost concentration for a period during the hearing".
20. The President's letter was duly copied to Mr Killeen for his observations. He responded by offering the Department's support for the appellant's ground of appeal based upon procedural unfairness. He submitted that the decision of the tribunal was erroneous in point of law.
21. Whereas the President of Appeals is not a party to these proceedings, and whereas the findings of the President of Appeals following a complaint are not conclusive evidence regarding the LQM's conduct, it is evident that the appellant's complaint has been upheld at least in part. I consider that I should admit the correspondence setting out the finding of the President of Appeal Tribunals that the LQM may have lost concentration for a period during the hearing.
22. The President's correspondence is consistent with the submissions of the appellant that the tribunal proceedings were unfair. Mr Killeen does not dispute this and now supports the appellant on this ground. I consider that he is correct to do so.
23. I accept the submissions of the parties to the effect that the tribunal has erred in law. I allow the appeal. 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

21 October 2024