

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Appeal by the Department to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 3 November 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is the Department for Communities' appeal from the decision of an appeal tribunal sitting at Enniskillen.
2. For the reasons I give below, I disallow the appeal.

REASONS

Background

3. The respondent claimed personal independence payment (PIP) from the Department for Communities (the Department) from 7 December 2016. Her claim was made on the basis of needs arising from degenerative disc disease, a "torn disc", multi-nodular enlarged thyroid, high blood pressure, depression and fibromyalgia. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and she returned this to the Department on 10 January 2017. She submitted a letter from her general practitioner (GP) dated 16 December 2016. The Department obtained a factual report from the respondent's GP on 23 January 2017. The respondent was asked to attend a consultation with a healthcare professional (HCP) on 25 January 2017 who prepared a report on behalf of the Department. On 22 February 2017 the Department decided that the respondent did not satisfy the conditions of entitlement to PIP from and including 7 December 2016. The respondent requested a reconsideration of the decision, submitting further evidence. She was notified on 6 April 2017 that the decision had been reconsidered by the Department but not revised. She appealed.

4. The appeal was heard by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After the hearing on 3 November 2017 the tribunal allowed the appeal, awarding the respondent the enhanced rate of the daily living component and the enhanced rate of the mobility component for a period of two years. The Department then requested a statement of reasons for the tribunal's decision and this was issued on 28 March 2018. The Department applied to the LQM for leave to appeal from the decision of the appeal tribunal. Leave to appeal was granted by a determination issued on 8 June 2018. The point of law on which leave was granted by the LQM was whether it had correctly interpreted "aid or appliance" and whether writing to communicate is an aid under Activity 7(b). On 13 June 2018 the Department submitted its appeal to a Social Security Commissioner.

Grounds

5. The Department submits that the tribunal has erred in law on the basis that it had wrongly accepted that writing things down to communicate was to use an aid or appliance to communicate, and that it had erred in law when it awarded 2 points under activity 7(b).
6. The respondent was invited to make observations on the Department's grounds. She submitted that the tribunal had not erred in law as alleged and indicated that she did not support the appeal.

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, which contained the PIP2 questionnaire completed by the applicant, the letter from the respondent's general practitioner (GP) dated 16 December 2016, a GP report pro forma dated 23 January 2017, a consultation report from the HCP and further medical evidence. It had a representative's submission prepared on behalf of the respondent with attached medical evidence. The respondent attended the hearing and gave oral evidence, represented by Ms Williams of Citizens Advice.
8. The evidence indicated that the respondent had been diagnosed with a significantly enlarged thyroid goitre, placing her under both emotional and physical strain, and affecting her breathing and everyday life. In respect of mobility activities, the tribunal accepted that the respondent should be awarded 4 points for descriptor 1(b) in the activity of "Planning and following a journey". The tribunal further accepted that the respondent should be awarded 8 points for descriptor 2(d) in the activity of "Moving around".
9. In respect of daily living activities, the tribunal accepted that the respondent should be awarded 4 points for the activity of "Preparing

food” on the basis that she required supervision or assistance. It awarded 2 points for the activity of “Taking nutrition” on the basis needing supervision. The tribunal awarded 2 points for “Washing and bathing” on the basis that the respondent used an adapted shower with a shower seat. The tribunal awarded 2 points for the activity of “Communicating verbally” on the basis that she wrote things down to communicate and therefore used an aid to speak. The tribunal further accepted that the respondent should be awarded 2 points for the activity of “Engaging with other people”, on the basis that she required prompting to engage with other people. As this totalled 12 points, the tribunal awarded the enhanced rate of the daily living component for a fixed period of 2 years.

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. Two relevant definitions appear in regulation 2, namely:

“aid or appliance”—

 - (a) means any device which improves, provides or replaces C’s impaired physical or mental function; and
 - (b) includes a prosthesis;

“communication support” means support from a person trained or experienced in communicating with people with specific communication needs, including interpreting verbal information into non-verbal form and vice versa;
13. Regulation 4 provides the framework in which assessment is to be carried out. It provides:

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.

14. The relevant scoring descriptors for the purpose of this appeal are set out at paragraph 7 of Part 2 of the Schedule to the 2016 Regulations. This provides:

PART 2
Daily living activities

Activity	Descriptors	Points
7. Communicating verbally.	a. Can express and understand verbal information unaided.	0
	b. Needs to use an aid or appliance to be able to speak or hear.	2
	c. Needs communication support to be able to express or understand complex verbal information.	4
	d. Needs communication support to be able to express or understand basic verbal information.	8
	e. Cannot express or understand verbal information at all even with communication support.	12

Submissions

15. The Department submits that the tribunal erred in law in deciding that descriptor 7(b) applied to the respondent, namely “needs to use an aid or appliance to be able to speak or hear”. The tribunal found as follows:

“The Appellant has been referred to speech therapy to help regain control of her voice box and throat muscles and has had ongoing problems with her windpipe. At the hearing she was very hoarse and difficult to hear and stated that her voice deteriorates the more she speaks and throughout the day. The Appellant stated that this makes her anxious and upset and she avoids people. It is noted that the assessment at her some commenced at 9.15am. On being asked if she used any aids she confirmed in hospital she wrote things down and she writes lists for her daughters and is getting speech therapy. As a result, we awarded 2 points as she needed to use an aid to speak”.

16. The Department submits that by regulation 2 of the 2016 Regulations, an aid or appliance is defined as a device which improves or replaces a

claimant's impaired function. It contended that, whereas the heading of the activity was "Communicating verbally", this was intended to refer to oral communication only. It contends that a pen and paper is not a relevant aid, as it would not enable the respondent to be able to communicate verbally. The Department relies on the *obiter* comments of Upper Tribunal Judge Gray in *EG v Secretary of State for Work and Pensions* [2017] UKUT 191. She had found, at paragraph 34, that "activity 7 tests communication by way of the spoken word". She elaborated at paragraphs 43-44, where she said:

43. "... Activity 7, however, appears to be testing not just a claimant's ability to take in verbal information, but to express it as well. Communicating verbally is thus a two-way process.

44. The baseline descriptor for activity 7, a "can express and understand verbal information unaided" refers to the spoken word and does not include written communication. The wording of descriptor b, meriting 2 points, "needs to use an aid or appliance to be able to speak or hear" is not assessing the ability to communicate in writing. Under my analysis a text to speech machine, or even a mobile phone used for a similar purpose, which communicated information at least in part in written words to another person does not satisfy the concept of two way communication by way of the spoken word".

17. The Department submitted that the tribunal may have been correct to determine that the respondent was unable to communicate verbally. However, in the light of the comments of Judge Gray, it contended that the tribunal had misdirected itself by deciding that the respondent could use [written words produced by] a pen and paper to communicate verbally.
18. Ms Williams for the respondent outlined the difficulties that the respondent faced in terms of "Communicating verbally". She had claimed PIP from 7 December 2016 at which time she was suffering from a thyroid problem. She had her thyroid removed in August 2017, but up to that point nodules were increasing in size and quantity and were pressing against her voice box, affecting speech and breathing. After surgery the respondent was referred for speech therapy, which began in March 2018. It was submitted that at the time of the decision (February 2017) the respondent would have been unable to finish a sentence without coughing and choking. She could not speak to an acceptable standard, and this increased her feelings of anxiety.
19. Ms Williams submitted that the respondent used a pen and paper to communicate verbally and that it did amount to an aid. She reiterated

that the respondent received help from her daughters when communicating.

20. I held an oral hearing of the appeal. Mr Williams of DMS appeared for the Department and made helpful submissions to amplify his skeleton argument. Ms Williams of Citizens Advice was unable to attend for the respondent but was content to submit written observations which, understandably, maintained that the tribunal's approach was correct. I am grateful to both of the representatives for their submissions and particularly to Mr Williams for his balanced, clear and helpful presentation at the hearing.

Assessment

21. The aspect of the tribunal's decision which is challenged by the Department's appeal is the award of two points for descriptor 7(b) within the activity of "Communicating verbally". The tribunal accepted that the respondent had physical difficulty speaking and used a pen and paper to communicate when she was unable to speak. It decided that this justified an award of points on the basis that she needed to use an aid to speak.
22. The relevant activity group is headed "Communicating verbally". This gave rise to an immediate uncertainty. To communicate verbally means to communicate by using words. Verbal communication therefore embraces both written and spoken communication. However, Mr Williams for the Department, while acknowledging that "verbal" and "oral" did not mean the same thing, submitted that the legislative intention behind this heading was to confine it to oral communication. He submitted that use of a pen and paper could not be an aid to oral communication as it could not help the respondent to speak or to hear.
23. His understanding was that the equivalent legislation had evolved when being drafted in Great Britain. He submitted that it initially contained spoken and written communication in the same activity, but that the relevant descriptors were later separated into two activity groups. He relied on the decision of Upper Tribunal Judge Gray in *EG v Secretary of State for Work and Pensions* [2017] UKUT 101. Judge Gray said at paragraph 34:

"34. The title of activity 7 is 'Communicating verbally', and the term 'verbal information' is used in the descriptors. The drafters' choice of 'verbal', the immediate dictionary sense of which concerns words written or spoken, rather than the terms aural and oral, that is to say to do with the ability to hear and speak, may be thought to include within the ability to communicate verbally the augmentation of the spoken word by use to the written word. However in the original draft which went out for consultation activities 7 and 8 appeared together in one

activity. The decision to separate them implies that the two activities are designed to deal with different issues. Activity 8 is headed 'Reading and understanding signs symbols and words'. The distinction appears to be that activity 7 tests communication by way of the spoken word, whereas activity 8 deals with written words and other written material".

24. I do not find myself in agreement with Judge Gray's analysis to the extent that it might exclude strategies such as the use of written words to assist a person who cannot speak or cannot hear, or the use of spoken words to assist a person who cannot see. As they are commonly used English words, the drafters of the legislation must be assumed to understand the difference in meaning between the words "verbally" and "orally". From that, I consider that they must have intended the consequences which flow from the use the word "verbally" instead of the word "orally".
25. A similar example of this use of language appeared in legislation governing employment and support allowance (ESA), as discussed by Upper Tribunal Judge Markus in *AT & VC v Secretary of State for Work and Pensions* [2016] AACR 8. Judge Markus considered policy material relating to ESA, by which the regulations concerned were intended to focus more on function than impairment. I observe that Judge Gray draws some support from this case at paragraph 35 of her decision. However, I am reluctant to accept that Judge Markus' interpretation, based on ESA policy as it was, should necessarily lend support to an interpretation in the context of PIP.
26. As identified by Judge Gray in paragraph 34, I acknowledge that there is a distinction between activity 7 and activity 8. However, the way that I would put it is that the former addresses disabilities affecting speech and hearing that have an effect on ability to communicate, whereas the latter addresses disabilities affecting sight that have an effect on ability to read and understand words and symbols. In other words, in the context of PIP, it appears appropriate to focus on the disability in issue, rather than the nature of the words or symbols that require to be expressed or to be understood.
27. As I said in C1/12-13(ESA), relying on the decision of Commissioner Brown in C2/98(IB) and of Chief Commissioner Martin in C31/98(IB), it has long been accepted that the heading of activities serves as an aid to interpretation. The heading of the activity in question is "Communicating verbally". Mr Williams submits that this should be read as "communicating orally", relying on Judge Gray's decision. However, the particular expression is not an ambiguous one and I see no reason for interpreting the plain words that appear in the 2016 regulations in a strained way.
28. The question that the tribunal sought to answer was whether, within the activity of "Communicating verbally", the respondent's need to write down

things when she could not speak meant that she fell within the descriptor of “b. Needs to use an [aid or appliance](#) to be able to speak or hear”. Further context is given by the definition of aid or appliance, which is any device which improves, provides or replaces the claimant’s impaired physical or mental function.

29. In the context of disabilities affecting hearing, the best known device that might fall within this definition is a hearing aid. This works by receiving sound waves through a microphone, converting them to electronic signals and sending them into the ear via an amplifier and a speaker. In the context of speech, it might include a portable voice amplifier that works a similar way. Each of these aids has the effect of improving the function of hearing or speech by augmenting sound waves generated in ordinary conversation. They are a very clear fit with using an aid to be able to speak or hear and there would be little dispute that they are relevant aids for descriptor 7(b) purposes.
30. However, other common aids exist to overcome disabilities in hearing or speech. People who have lost the ability to speak at all may use voice output communication aids with digitised (the pre-recorded speech of the user) or synthesised (computer generated) speech. The user might type words using a keyboard, which are then output as soundwaves emulating speech. Another electronic device, very commonly used by people with hearing disabilities in the era before SMS, is the Minicom. This is a small electronic typewriter and screen linked to a telephone system, enabling people with hearing or speech difficulties to send and receive messages. In the days before text messaging was available, it was the only aid to enable remote communication.
31. Both the voice output communication device and the Minicom are aids that are useful for people with severe speech or hearing disabilities. However, neither of them augments sound waves generated by speech in ordinary conversation. One turns keyboard input into computer generated sound, while the other turns keyboard input into text. Neither of them, therefore, involves communicating orally, but both of them involve communicating verbally. Would a claimant using either device be using an [aid or appliance](#) to be able to speak or hear? On the definition of aid that means a device that improves, provides or, crucially, replaces speech or hearing, I believe so.
32. However, Judge Gray said further at paragraph 44:

“44. The baseline descriptor for activity 7, a “can express and understand verbal information unaided” refers to the spoken word and does not include written communication. The wording of descriptor b, meriting 2 points, “needs to use an aid or appliance to be able to speak or hear” is not assessing the ability to communicate in writing. Under my analysis a text to speech machine, or even a mobile phone used for a

similar purpose, which communicated information at least in part in written words to another person does not satisfy the concept of two way communication by way of the spoken word”.

33. This passage is the foundation of the Department’s appeal in the present case. The Department interprets Judge Gray to be saying that the use of an aid based around the input of text cannot be considered under activity 7(b). However, on the basis of my own analysis of 7(b) above, I must respectfully disagree with what I also understand Judge Gray to say at paragraph 44 of *EG v SSWP*, and with the Department’s reliance on her decision to that effect.
34. The above discussion does not resolve the precise issue that falls for determination in this case, of course. That issue is whether using a pen and paper to communicate in the absence of speech falls within the scope of using an aid or appliance to be able to speak or hear.
35. While the descriptor in issue reads “needs to use an aid or appliance to be able to speak or hear”, an aid is something that improves, provides or replaces the claimant’s impaired physical or mental function. The impaired physical function in this case is the ability of the respondent to speak. The tribunal was satisfied on the evidence that the respondent used a pen and paper to replace her impaired speech. In making the finding that the respondent satisfied descriptor 7(b), in view of the activity heading “Communicating verbally” and considering the definition of an aid or appliance at regulation 2 of the 2016 Regulations, I cannot say that it has misdirected itself on the law.
36. It follows that I must disallow the Department’s appeal.

(signed): O Stockman

Commissioner

3 July 2019