

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 13 November 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from the decision of an appeal tribunal sitting at Omagh.
2. An oral hearing of the appeal has been requested. Nevertheless, I consider that the proceedings can properly be determined without an oral hearing.
3. For the reasons I give below, I allow the appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

4. The appellant had previous awards of disability living allowance (DLA) from 3 July 2015, most recently at the low rate of the mobility component and the middle rate of the care component. As his DLA entitlement was coming to an end he was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). He made a telephone claim from 6 March 2017 on the basis of needs arising from carpal tunnel syndrome, depression, chronic pain in the neck, shoulders, back, hips, knees and feet, iron deficiency anaemia, fibromyalgia, severe back pain from a vertebral fracture and degeneration, and irritable bowel syndrome (IBS). He was asked to complete a PIP2 questionnaire to describe the effects of his disability and

returned this to the Department on 24 April 2017, submitting supporting evidence. He was asked to attend a consultation with a healthcare professional (HCP) and a consultation report was received by the Department on 14 June 2017. On 16 June 2017 the Department decided that the appellant scored 9 points for daily living activities and 12 points for mobility activities, and that he satisfied the conditions of entitlement to the standard rate of the daily living component and the enhanced rate of the mobility component of PIP from 19 July 2017 to 5 June 2023. The appellant requested a reconsideration of the decision, and he was notified that the decision had been reconsidered by the Department but not revised. He appealed.

5. 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 13 November 2018 the tribunal disallowed the appeal in relation to the mobility component, removing the enhanced mobility component. It allowed the appeal in relation to the daily living component, maintaining the award of the daily living component at the standard rate, but reducing its duration by two years to the period from 19 July 2017 to 5 June 2021. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 24 April 2019. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal and leave to appeal was granted by the LQM in a determination issued on 13 June 2019.
6. The points of law on which leave was granted were whether the tribunal had correctly used the evidence of the appellant's recent holiday in assessing function at the date of decision, and whether the tribunal had formed a view without looking at all of the evidence. On 25 June 2019 the appeal was submitted to a Social Security Commissioner.

Grounds

7. The appellant submits that the tribunal has erred in law on the basis that:
 - (i) it focused on the appellant's recent holiday and recent hospital attendance and thereby gave undue weight to recent events rather than the circumstances obtaining at the date of the decision under appeal;
 - (ii) it adopted an inconsistent approach to the appellant's oral evidence.
8. The Department was invited to make observations on the appellant's grounds. Mr Williams of Decision Making Services (DMS) responded on behalf of the Department. Mr Williams submitted that the tribunal had erred in law as alleged and indicated that the Department supported the appeal.

The tribunal's decision

9. 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 appellant, a consultation report from the HCP, medical reports and previous DLA evidence. The tribunal had sight of the appellant's medical records. He attended the hearing and gave oral evidence, accompanied by his wife and represented by Mr Sally, solicitor. At the hearing the appellant gave evidence about the various restrictions on daily living and mobility activities. At one point, he was asked about how he had coped at the airport when going on a holiday that had led to his scheduled hearing in June 2018 being postponed.
10. The tribunal considered the appellant's oral evidence generally and the medical reports. It found that the appellant's account could not be relied upon and that he grossly overstated his limitations. It noted that the appellant had a genuine psychological condition and that perception of pain was dependent on the individual but nevertheless that he overstated his limitations. It accepted that he scored points for the daily living activities of preparing food, washing and bathing, managing toilet needs and dressing and undressing. It found that he scored no points for mobility activities. The tribunal awarded the standard rate of the daily living component of PIP.

Relevant legislation

11. 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.
12. 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

13. It is evident that the tribunal considered the ability of the appellant to cope in the airport when going on holiday in June 2018. This was one year after the date of the decision under appeal. Mr Williams for the Department made the following observations:

“[The appellant]’s previous appeal hearing in June 2018 was postponed as he was due to be on holiday at this time. [The appellant] has referred to the tribunal relying on his recent holiday as evidence of his ability to carry out Mobility Activity 2, ‘Moving Around’. I have noted the following from the record of proceedings:

“The Appellant and his wife were asked about their holiday to Lanzarote which was given as the reason for a previous appointment of the appeal hearing. In particular, the tribunal asked if there were any special travel arrangements made to accommodate the appellant’s stated needs

The Appellant’s wife: We didn’t make any advance arrangements. I go to the same apartment each time. With hindsight I should have made arrangements.

The Appellant and his wife were asked for details about getting through the airport and boarding the plane. They said they left from Belfast International Airport. The Tribunal members explained they were familiar with the layout of the airport. They described going up the elevator at the airport and then going in the fast-track lane. They said a member of the staff at the airport help them through security. They then used the steps onto the plane. They explained this was a trip they had made a number of occasions in the past. They confirmed there were no other special arrangements when they arrived.”

In addition, I have noted the following from the statement of reasons:

“4. In considering the appeal we must focus upon how the Appellant was around the time of decision under appeal, namely, 16 June 2017....

....27. Furthermore, at the end of the hearing we asked him about his recent holiday. He is of course perfectly entitled to take a holiday but we were using this as an attempt to assess his function. It was not a new situation for the appellant as he and his

wife told us they had been to the same resort on numerous occasions. Consequently, they knew what was involved yet no special measures were taken. We did not find this consistent with the level of restriction claimed. He had flown from Belfast International Airport. There would be a walk to the terminal from the vehicle that brought him to Aldergrove. He would then have to walk through the hall and then use the elevator and then pass through security. On the large planes used in such flights there would be numerous steps to climb. If the Appellant were genuinely as restrictive as claimed we would have expected he or his wife to have made enquiries with the airport about assistance. Airports nowadays are obliged to have made enquiries with the airport about assistance. Airports nowadays are obliged to have regard to disability needs and can provide wheelchairs and lift access including lifts onto the plane.....

....34. Of more practical significance to the Appellant is the fact we have changed the scoring in respect of mobility. It was our view that the assessment he could not manage 30 metres was a gross overstatement. This did not reflect the fact that the neurological examination was normal and there were no major issues with his lower limbs albeit his knees can cause pain. We did accept that he may experience discomfort on extended walking but in our view 200 m was well within his capacity. In scoring the Appellant we have had regard to what was said in section 4 of the regulations”

The decision of The Department under appeal was dated 16/06/17. Article 13(8)(b) of the Social Security (NI) Order 1998 provides:

“13(8) In deciding an appeal under this Article, an appeal tribunal –
(b) shall not take into account any circumstances not obtaining at the time when the decision appealed against was made.”

In decision C24/03-04(DLA), Commissioner Brown discussed the provisions of Article 13(8)(b) and held at paragraph 7:

“This is a mandatory provision. It prevents the Tribunal from taking account of circumstances not obtaining at the date of the decision under appeal. It does not relate to evidence whenever it came into being, which is relevant to what the circumstances were up to the date of the relevant decision. It does not prevent the Tribunal taking into account evidence obtained after the decision under appeal was made, for the purpose of drawing inferences as to the circumstances obtaining when or before the decision was made. For example, if a claimant tells the Tribunal that his situation now is the same as it was at the date of the decision under appeal and produces evidence as to his present walking ability, why should that latter evidence if accepted not be used to determine the circumstances at the date of the claim?”

It appears to me that [the appellant] has raised a valid point in respect of the tribunal taking into consideration circumstances after the decision under appeal, despite recording that it had to consider how he was around the time of the decision under appeal. The tribunal has stated that it was using [the appellant]’s holiday to attempt to assess his function. However, this holiday was 12 months after this decision of The Department. Although the tribunal has also referred to [the appellant] and his wife going to the same resort on numerous occasions, I can see no record of it investigating when these other holidays were, or how [the appellant] coped on these other occasions. In addition, the tribunal does not appear to have attempted to relate the information about [the appellant] making his way through the airport to his condition at the time of the decision, or acknowledged the time that had passed between the decision and the actual holiday.

I have also noted in paragraph 22 of the tribunal’s statement of reasons a reference to a report from Dr Eames that [the appellant] had a good range of movement. Paragraph 20 of the statement of reasons clearly indicates that this report is dated 20/09/18 which is

15 months after the decision under appeal. I would again consider that the tribunal has erred in considering [the appellant]'s ability to function at the time of this report. It is apparent from the statement of reasons that the tribunal considered there to be the possibility of [the appellant]'s condition improving and I would contend that it has erred in law by taking into consideration circumstances not obtaining at the time the decision was made. I would therefore support this issue raised by [the appellant].

14. It appears to me that the submissions of the appellant, supported by Mr Williams as set out above, establish that the tribunal has taken into account matters not obtaining at the date of the decision under appeal. By Article 13(8)(b) of the Social Security (NI) Order 1998 it is precluded from doing so. Whereas it has made findings based upon other sources of evidence, the tribunal has based its decision substantially on the credibility of the applicant's oral evidence. It is difficult to assess the extent to which the oral evidence relating to the June 2018 holiday has tainted the tribunal's overall assessment of credibility. For that reason, despite its reliance upon other evidence, I consider that the tribunal has materially erred in law. I conclude that I must allow the appeal and set aside the decision of the appeal tribunal.
15. The effect of my decision is to restore the appellant's entitlement to that given under the Department's reconsideration decision of 16 August 2017, namely that he satisfies the conditions of entitlement to the standard rate of the daily living component and the enhanced rate of the mobility component of PIP from 19 July 2017 to 5 June 2023.
16. I now refer the appeal to a newly constituted tribunal for a determination.

(signed): O Stockman

Commissioner

12 November 2019