

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**DISABILITY LIVING ALLOWANCE**

Appeal to a Social Security Commissioner  
on a question of law from a Tribunal's decision  
dated 30 January 2019

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is a claimant's appeal from the decision of an appeal tribunal sitting at Magherafelt.
2. For the reasons I give below, as each of the parties submits that the tribunal has erred in law, I set aside the decision of the appeal tribunal under Article 15(7) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

**REASONS**

**Background**

3. The appointee claimed disability living allowance (DLA) on behalf of her daughter (the appellant) from the Department for Communities (the Department) from 28 December 2017 on the basis of needs arising from visual impairment, dyslexia, behavioural issues and borderline autism. Along with the claim form, she submitted educational psychology reports. The Department obtained a report from the appellant's school on 21 March 2018. On 10 April 2018 the Department decided on the basis of all the evidence that the appellant did not satisfy the conditions of entitlement to DLA from and including 28 December 2017. The appointee requested reconsideration of the decision. The decision of 10 April 2018 was reconsidered by the Department but not revised. The appointee appealed, but waived the right to an oral hearing of the appeal. An oral hearing of the appeal was nevertheless directed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After an oral hearing on 30 January 2019, which the appointee did not attend, the tribunal disallowed the appeal. The appointee then requested a statement of reasons for the tribunal's decision and this was issued on 9 May 2019. The appointee 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 12 June 2019. The ground on which leave was granted was whether the tribunal had correctly applied the law on whether the appellant had needs substantially in excess of a child without a disability. On 27 June 2019 the appellant submitted her appeal to a Social Security Commissioner.

### **Grounds**

5. The appointee submits that the tribunal has erred in law on the basis that:
  - (i) it failed to address the appellant's dyslexia during the decision process;
  - (ii) it failed to reconcile diverging evidence about the appellant's toilet needs.
6. The grounds of appeal are not related to those on which there has been a grant of leave to appeal by the LQM. Nevertheless, the Department was invited to make observations on the appointee's grounds. Mr Arthurs of Decision Making Services (DMS) responded on behalf of the Department. Mr Arthurs submitted that the tribunal had erred in law as alleged in the first ground advanced and indicated that the Department supported the application.

### **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, containing the DLA claim form, a school report and an educational psychology report. The tribunal further had sight of a referral letter to the paediatric ASD diagnostic service and a letter from the appointee, indicating that she would not attend the hearing and asking the tribunal to proceed without her. The tribunal had sight of the appellant's medical records. The appointee did not attend the oral hearing and there was no oral evidence. The Department was represented by a presenting officer, but no name is recorded.
8. The tribunal set out the evidence before it, noting that the appointee indicated in the claim form that the appellant had visual impairment and dyslexia, as well as borderline autistic features and behavioural issues. It

noted that the appellant had presented with some challenging behaviours but did not meet the criteria for a diagnosis of autistic spectrum disorder. An educational psychology assessment had identified needs due to learning difficulties in certain subjects. The school principal had reported literacy difficulties but indicated that the appellant had the ability to participate in all school activities including PE, and to dress, eat and attend to her own toilet needs. The appointee had indicated that the appellant needed help to dress and needed help with cleaning herself after using the toilet.

9. The tribunal found that, while the appellant was behind with her school work, there was no medical or physical difficulty that would confer entitlement to DLA. It disallowed the appeal.

### **Relevant legislation**

10. The legislative basis of the care component is found at section 72 of the Social Security Contributions and Benefits Act (NI) 1992. This provides:

**72.—**(1) Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which—

(a) he is so severely disabled physically or mentally that—

(i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or

(ii) he cannot prepare a cooked main meal for himself if he has the ingredients;

(b) he is so severely disabled physically or mentally that, by day, he requires from another person—

(i) frequent attention throughout the day in connection with his bodily functions; or

(ii) continual supervision throughout the day in order to avoid substantial danger to himself or others; or

(c) he is so severely disabled physically or mentally that, at night,—

(i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or

(ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him.

(2) Subject to the following provisions of this section, a person shall not be entitled to the care component of a disability living allowance unless—

(a) throughout—

(i) period of 3 months immediately preceding the date on which the award of that component would begin; or

(ii) the such other period of 3 months as may be prescribed, he has satisfied or is likely to satisfy one or other of the conditions mentioned in subsection (1)(a) to (c) above; and

(b) he is likely to continue to satisfy one or other of those conditions throughout—

(i) the period of 6 months beginning with that date; or

(ii) (if his death is expected within the period of 6 months beginning with that date) the period so beginning and ending with his death.

11. The legislative basis of the mobility component is section 73 of the same Act. This provides:

**73.—**(1) Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the relevant age and throughout which—

(a) he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so;

(ab) he falls within subsection (2) below;

(b) he does not fall within that subsection but does fall within subsection (2) below;\_

(c) he falls within subsection (3) below; or

(d) he is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time.

...

### **Assessment**

12. The appointee, among her grounds of application, submitted that tribunal did not address the appellant's dyslexia in the course of its decision. She referred to other characteristics of the appellant's behaviour and referred to legal definitions of disability.
13. While disputing the appointee's second ground, Mr Arthurs for the Department supported the appointee's first ground and submitted that the tribunal had erred in law. He noted that in *KM v Secretary of State for Work and Pensions* [2013] UKUT 159 it was accepted by a three judge panel of Upper Tribunal judges in Great Britain that a person with dyslexia had a functional or mental disability or impairment and that educational needs could count as attention provided that it was given in consequence of the relevant functional disability and had a sufficiently intimate and personal quality to qualify as attention in the light of established authority. He observed that the educational psychologist's report had referred to issues "suggestive of a specific disability in literacy (dyslexia)".
14. Mr Arthurs addressed the evidence before the tribunal and submitted that none of this had expressly confirmed a diagnosis of dyslexia. However, he submitted that the tribunal had failed to address the issue of dyslexia and to reach any conclusions on whether it was present in the appellant's case and, if so, whether the appellant's resulting needs amounted to attention.
15. Having considered the papers before me, I accept that the tribunal has not made a finding on the issue of whether the appellant had dyslexia and any attention needs arising from it. As each of the parties in the appeal submits that the tribunal has erred in law, and as the issue arises from the lack of a finding on a particular issue, I consider that I do not need to make a formal decision on the question of whether the tribunal

has erred in law. It appears to me that this is an appropriate case in which to exercise the power under Article 15(7) of the Social Security (NI) Order 1998 and to set aside the decision of the appeal tribunal on the basis of the parties' consent.

16. I set aside the decision of the appeal tribunal and direct that the appeal shall be determined by a newly constituted tribunal. That tribunal shall in particular address the issue of whether the appellant suffers from dyslexia and has any resulting attention needs that satisfy the qualitative intimate and personal considerations set out in the established authorities.
17. The appointee did not attend on the last occasion, but should note that it may be beneficial for her to make efforts to attend the reconstituted hearing.

(signed): O Stockman

Commissioner

13 January 2020