

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 31 July 2019

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 ST/7390/17/03/D.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The applicant had previously been awarded disability living allowance (DLA) from 25 June 2015, at the low rate of the mobility component and the high rate of the care component. As his award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, he claimed Personal Independence Payment (PIP) from the Department for Communities (the Department) from 16 February 2017 on the basis of needs arising from attention deficit hyperactivity disorder (ADHD) and a rotator cuff injury.
4. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 26 May 2017 along with further evidence. He asked for evidence relating to his previous DLA claim to be considered. The applicant was asked to attend a consultation with a healthcare professional (HCP) and the Department

received a report of the consultation on 22 June 2017. On 27 July 2017 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 16 February 2017. The applicant requested a reconsideration of the decision. 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. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 30 December 2019. The applicant 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 11 March 2020. On 17 June 2020 the applicant applied to a Social Security Commissioner for leave to appeal.
6. The application was received after the expiry of the relevant statutory time limit, explaining that his representative was unable to access his file due to the outbreak of Covid-19. However, although the application was late, it was made before the end of the final date for applying for leave to appeal. On 20 October 2020, Chief Commissioner Mullan admitted the late appeal for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

7. The applicant, represented by Advice Northwest, submits that the tribunal has erred in law by failing to resolve conflicts of fact or opinion and by giving weight to immaterial matters. It is submitted that the tribunal wrongly took into account evidence about the applicant's attendance at university, when this was not a factor when he claimed PIP aged 17.
8. The Department was invited to make observations on the applicant's grounds. Mr Collins of Decision Making Services (DMS) responded on behalf of the Department. Mr Collins submitted that the tribunal had not materially erred in law. He indicated that the Department did not support the application.

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 PIP2 questionnaire completed by the applicant along with evidence of prescriptions and an appointment letter, a consultation report from the HCP, evidence relating to the previous DLA claim, a letter from CAMHS, a GP letter and a supplementary advice note. The tribunal also had a submission from the applicant's representative and extracts from his

medical records. He attended the hearing and gave oral evidence, represented by Ms Fulton.

10. The tribunal heard that the applicant was presently attending University in Brighton. He gave evidence about his daily living activity and mobility difficulties. In reaching its decision the tribunal took into account the applicant's ability to attend university in Brighton and therefore to live independently of his parents. It took account of his ability to drive a car. It noted that at the time of his claim in June 2017 he was working part-time as a waiter in a local bar. It found that his ability to move to England and study suggested an ability to adapt and that he could function independently, disallowing the appeal.

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. 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 applicants 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. The application noted that the decision under appeal was dated 27 July 2017. It observed that the applicant (then aged 17 years four months)

was living at home and studying for A levels. He subsequently began attending university in Brighton in September 2018 (aged 18 years six months). While the applicant's representative acknowledged that the applicant was asked at hearing about circumstances previous to the decision date, he pointed out that he was also asked about his university experience. It is submitted that the tribunal has relied on post-decision evidence, which would be impermissible under Article 13(8)(b) of the Social Security (NI) Order 1998.

17. Mr Collins for the Department acknowledged that the tribunal has addressed post-decision circumstances. He submitted however, that the tribunal had also addressed the evidence relating to the correct time period and that any findings in the light of the circumstances in the later period were made in the context of evidence of circumstances obtaining at the date of decision. He does not support the application for that reason.

18. The tribunal notes at paragraphs 14-17 of its statement of reasons:

“14. The first observation we make is that he drives a motorcar ...

16. The second factor which indicated independent function was the various part-time jobs he has held. He described working at nights in two bars. He said his tasks involved collecting and washing glasses. This would suggest an ability to engage with other people and to have awareness of his surroundings.

17. Most significantly is the fact that he has been attending university in Brighton. This was a good indicator of his ability to live independently of his parents. The fact that the family would contemplate such studies away from home indicate they felt he could manage in their absence...”

19. It appears that the tribunal placed most weight on the applicant's attendance at university. This would be permissible if it post-dated the date of decision but was nevertheless an accurate indicator of the circumstances obtaining at the date of decision. Mr Collins suggests that the tribunal had sufficient evidence from the other findings it had made. However, it is difficult to ignore the tribunal's reference to that evidence relating to university life as being the most significant.

20. A relevant factor complicating the picture is the effect of increased maturity due to age. It would be difficult to envisage a school student aged 17 years and four months – as the applicant was at the date of decision - being expected to live away from home at university. He would have been developing and maturing throughout the period after his PIP claim. The applicant was 18 years and six months when he went to

Brighton. I understand that the tribunal was seeking to address the effects of ADHD on the applicant's ability to function without reference to age. However, it appears to me that its reasoning was, in effect, that if the applicant was able to manage aged 18, that he could have managed when aged 17. I do not accept that this follows. The ability of the applicant had to be addressed as he was at 17 and the post-decision circumstances of going to university did not, to my mind, reflect on how he was at that younger age.

21. It seems to me that I must grant leave to appeal on the basis that the tribunal has considered post-decision circumstances.
22. Whereas Mr Collins submits that the tribunal was entitled to make its findings on the general evidence before it, I do not accept this submission. It appears to me that the tribunal placed most weight on the post-decision evidence. Without consideration of the evidence regarding university it is not clear to me that the tribunal would necessarily have reached the same decision. Therefore it had a material effect on the outcome.
23. I consider that I must allow the appeal and set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

20 January 2021