

RE: EM (A CHILD)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

DISABILITY LIVING ALLOWANCE

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 19 August 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 LD/3434/18/37/D.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal.
3. I make findings of fact and decide the appeal myself under Article 15(8)(a) of the Social Security (NI) Order 1998. I find that there are grounds to supersede the decision dated 21 April 2016, namely relevant change of circumstances. I award the high rate of the mobility component and the high rate of the care component from 16 August 2018 to 3 November 2025 inclusive.

REASONS

Background

4. This appeal considers a tribunal's approach to identifying "severe behavioural problems" for the purposes of DLA high rate mobility component and to addressing evidence relevant to the issue.
5. The appellant was born in November 2013. Her mother claimed disability living allowance (DLA) from the Department for Communities (the

Department) from 22 January 2016 on the basis of needs arising from development delay, learning disability, impaired hearing and speech/language problems. The Department obtained a community paediatrician's report on 18 April 2016. On 21 April 2016 the Department awarded the middle rate of the care component from 22 January 2016 to 3 November 2018. On 16 August 2018 a renewal claim form was submitted. On 11 October 2018 the Department superseded the existing award, increasing it to the high rate care component from 16 August 2018 to 3 November 2025 and awarding low rate mobility component from 4 November 2018 to 3 November 2025. On the same date the appellant's mother was appointed to act for her in managing her DLA claim. The appointee requested a reconsideration of the decision, submitting further evidence. She was notified that the decision had been reconsidered by the Department but not revised. She appealed.

6. 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, maintaining the existing award but declining to award high rate mobility component. The appointee then requested a statement of reasons for the tribunal's decision and this was issued on 11 March 2020. The appointee 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 14 September 2020. On 5 October 2020 the appointee applied to a Social Security Commissioner for leave to appeal.

Grounds

7. The appointee submitted that the tribunal has erred in law, setting out factual submissions relevant to the issue of high rate mobility component on the basis of severe mental impairment and severe behavioural problems.
8. The Department was invited to make observations on the appellant's grounds. Ms Patterson of Decision Making Services (DMS) responded on behalf of the Department. Ms Patterson submitted that the tribunal had not materially erred in law. She 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, which contained the DLA claim form from 2016, a factual report from a community paediatrician dated April 2016, a factual report completed by the appellant's general practitioner (GP) dated May 2016, a supersession request on a DLA434 form dated May 2016, an educational psychology report of May 2016, and a health visitor report of June 2016, the renewal claim form of August 2018, an

autistic spectrum diagnosis of September 2017, an educational psychology report of December 2016, a statement of special education needs dated July 2017 and a submission from the appointee dated October 2018. The tribunal further had information before it in the form of an Understanding the Needs of Children in Northern Ireland (UNOCINI) report dated April 2019, an occupational therapist's report of January 2019, a school report of May 2019, a representative's submission and a further Departmental submission. The tribunal also had sight of the appellant's medical records. The appointee attended and gave evidence, along with the appellant's father, and was represented by Mr McGuinness. The Department was represented by Mr McKavanagh.

10. The tribunal observed that entitlement to the high rate care component and low rate mobility component was not in dispute. The issue in the appeal was whether the appellant satisfied the conditions of entitlement to high rate mobility component under section 73(1)(c) of the Social Security Contributions and Benefits (NI) Act 1992. The conditions require the claimant to be severely mentally impaired, display severe behavioural problems and be entitled to high rate care component. The tribunal considered the definition of severe behavioural problems in regulation 12(6) of the Social Security (Disability Living Allowance) Regulations (NI) 1992. The tribunal addressed the evidence and accepted that the appellant's behaviour was challenging and disruptive, but was not satisfied that it was so extreme as to satisfy regulation 12(6).
11. It followed an interpretation of Commissioner Rowland in CDLA/2470/2006 that held that "extreme behaviour is of a type that regularly requires a substantial degree of intervention and physical restraint". The tribunal considered the level of restraint needed for a child of the appellant's age and size. In this context, it declined to award high rate mobility component but continued the award of high rate care and low rate mobility from 16 August 2018 to 3 November 2025 inclusive.

Relevant legislation

12. By section 73 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992:

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—

...

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

...

(1A) In subsection (1) above "the relevant age" means—

(a) in relation to the conditions mentioned in paragraph (a), (ab), (b) or (c) of that subsection, the age of 3;

...

(b) In in relation to the conditions mentioned in paragraph (d) of that subsection, the age of 5.

(3) A person falls within this subsection if—

(a) he is severely mentally impaired; and

(b) he displays severe behavioural problems; and

(c) he satisfies both the conditions mentioned in section 72(1)(b) and (c) above.

...

(6) Regulations shall specify the cases which fall within subsection (3)(a) and (b) above.

...

13. By regulation 12 of the Social Security (Disability Living Allowance) Regulations (NI) 1992 (the DLA Regulations):

(5) A person falls within section 73(3)(a) (severely mentally impaired) if he suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning.

(6) A person falls within section 73(3)(b) (severe behavioural problems) if he exhibits disruptive behaviour which—

(a) is extreme;

(b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property; and

(c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake.

Hearing

14. I held an oral hearing of the application. Due to ongoing Covid-19 restrictions, I directed an online hearing using Sightlink technology. The appellant was represented by Mr O'Farrell and the respondent by Ms Patterson. I am grateful to them for their careful submissions.
15. In the light of the fact that the submissions from the Department concurred with the submissions of the appellant, it appeared to me that the appellant clearly established an arguable case of error of law. I granted leave to appeal and with the consent of the appellant proceeded to treat and determine the application as an appeal.
16. Mr O'Farrell, now acting for the appellant, submitted that, with the diagnosis of autistic spectrum disorder and in the light of *MMcG v Department for Social Development* [2012] NI Com 292, it was not disputed that the requirements of regulation 12(5) were satisfied. Ms Patterson concurred.
17. Turning to regulation 12(6), he observed that the tribunal found that the appellant's behaviour was "disruptive, but was not so extreme that it satisfied regulation 12(6) ...". He submitted that the key issue was whether the appellant's behaviour reached a threshold of being "extremely disruptive" in the context of the analysis of Commissioner Rowland in *CDLA/2470/2006*, which the tribunal had cited and relied upon. He observed that the tribunal had accepted the appellant's behaviour as being "very challenging".
18. Mr O'Farrell submitted that the tribunal had found that "extreme" means behaviour of a type that regularly requires substantial intervention and physical restraint (following Upper Tribunal Judge Wikeley in *Secretary of State for Work and Pensions v MG*). He submitted that in light of the evidence that the appellant required substantial intervention and physical restraint the tribunal had not applied the law correctly.
19. He noted that the UNOCINI report had established that the appellant met the "Priority One – Critical" threshold of the guidance in respect of challenging behaviour and that the appellant required an "intense level of supervision within and outside the home to ensure her safety". The report also referenced a lack of awareness of danger on the part of the appellant.
20. While accepting that evidence indicated the appellant as happy within structured environments, such as school, examples of her behaviour included smearing and eating her own excrement, tantrums, hurting herself, climbing to heights in the home and attempting to run away. She was described in evidence as impulsive, unpredictable, uncontrollable and sensitive to noise/crying. Reports indicated that she was significantly delayed in speech, walking and motor skills.
21. Against the background of the evidence, Mr O'Farrell submitted that the tribunal had set the bar too high in finding that the appellant's behaviour was not extreme. While accepting that her behaviour was "very

challenging” and “challenging” at different paragraphs in its decision, he submitted that it misdirected itself in terms of applying the legislation to the appellant. In particular, her classification under the UNOCINI report was “Priority One”, which equated in the UNOCINI guidance to “behaviour ... of such intensity, frequency or duration as to threaten the quality of life and /or the physical safety of the individual or others and is likely to lead to responses that are restrictive, aversive or result in exclusion”. The UNOCINI guidance referred to such behaviour as “challenging”.

22. Ms Patterson for the Department accepted that the tribunal had erred in law. She submitted that the tribunal had not had sufficient regard to the case law and the evidence as a whole. Relying on Upper Tribunal Judge Mark in *SSWP v DM* [2010] UKUT 318 she acknowledged that interventions may be regular if they are frequent in one context but infrequent, or even rare, in another context, provided that looked at overall there is a regular requirement to intervene and physically restrain the claimant. She observed that the tribunal had followed *CDLA/2470/2006* but queried its conclusions as to the meaning of “extreme”.
23. Each of the parties submitted that I should set aside the decision of the appeal tribunal. In addition, they submitted that I was in a position to determine the appeal myself on the uncontested evidence.

Assessment

24. It is axiomatic that an appeal on point of law should not turn into a simple reconsideration of the evidence before the tribunal. The tribunal took the view on the evidence before it that the appellant’s behaviour did not amount to “disruptive behaviour which was extreme, regularly requires another person to intervene and physically restrain him in order to prevent him from causing physical injury to himself or another, or damage to property and is so unpredictable that it requires another person to be present and watching over him whenever he is awake” (as required by regulation 12(6) of the DLA Regulations).
25. In essence, Mr O’Farrell submitted that the tribunal had set the bar too high in determining that the appellant’s behaviour was not extreme, relying on the evidence in the UNOCINI Report to submit that it plainly reached this threshold.
26. Ms Patterson for the Department had resiled from the position she had originally adopted, accepting that the tribunal may not have correctly considered the evidence which supported the contention that the appellant’s behaviour met the definition of “extreme”. She submitted that this was a material error of law.
27. Commissioner Bano in *CDLA/2054/1998* at paragraph 7 referred to the word “extreme” as “an ordinary word connoting something wholly out of the ordinary”. However, the three elements of regulation 12(6), namely

that behaviour is (a) extreme (b) requires intervention and (c) is unpredictable, have been read by the Great Britain Commissioners and by the Upper Tribunal as cumulative. Thus, Commissioner Rowland in *CDLA/2470/2006*, at paragraph 13, found that regulation 12(6)(a) did not add a great deal to the other sub-paragraphs unless indicating that the behaviour was of a type that regularly required a substantial degree of intervention and physical restraint – i.e., something much more than merely taking the person by the arm. Subsequently, however, Upper Tribunal Judge Mesher in *CDLA/2617/2010* doubted that Commissioner Rowland was intending to lay down any hard and fast rule regarding levels of restraint and Upper Tribunal Judge Wikeley agreed with Judge Mesher in *SSWP v MG* [2012] UKUT 429 (at paragraph 26), observing that the degree of restraint needed to avert danger in the case of a 5 year-old would be less than that needed for a 16 year-old.

28. The tribunal in the present case has adopted a careful and thoughtful approach to the legislation, the authorities and the evidence. Noting the authorities which required intervention and restraint, it said that “the Tribunal considered the level of restraint that could be required for a girl of [the appellant’s] age and size”. In this context it found that the appellant’s behaviour was disruptive but was not so extreme that it satisfied regulation 12(6).
29. I observe that in *CDLA/2470/2006* Commissioner Rowland was addressing a case of a 16 year-old with Downs Syndrome. The behaviour in issue was that he would regularly sit down when walking outdoors and refuse to walk further. The input required from his carers was the opposite of restraint. As restraint did not actually arise in that case, I agree with Judge Mesher and Judge Wikeley that no hard and fast rule about levels of restraint was intended to be laid down by the learned Commissioner’s remarks in *CDLA/2470/2006*.
30. From the statement of reasons in the present case, however, it is evident that the tribunal has addressed itself to the level of restraint required in the case of a [then] 4 year-old. It appears to me that this approach was focused on a matter that does not go to the heart of the legislative test. The real question in a case like the present one is what is the extent of the impulsivity or unpredictability of the claimant’s actions that require responding interventions from a carer to avoid danger, as opposed to any particular degree of physical restraint required in those interventions. It seems to me that the tribunal approached the meaning of “extreme” in a manner which misconstrued the relevant statutory test.
31. Having considered the submissions of the parties, which are in agreement that the tribunal has erred in law, I accept that the tribunal has erred in law for the reasons I give above.
32. I allow the appeal and I set aside the decision of the appeal tribunal.

Disposal

33. Each of the parties submits that there is sufficient evidence before me to decide the appeal myself. The appellant in particular highlights the considerable backlog in appeals which appears likely to have been generated by the suspension of tribunal hearings due to the coronavirus pandemic. In these circumstances, I have decided to determine the appeal myself, rather than remit it to a newly constituted tribunal.
34. I accept that part of the Department's decision superseding the existing decision and awarding high rate care component from and including 16 August 2018.
35. The parties agree that regulation 12(5) of the DLA Regulations was satisfied at the material time. I note in particular that Ms Patterson accepted for the Department that on the basis of reports before the tribunal there was evidence confirming impairment of intelligence and social functioning. I therefore accept that section 73(3)(a) of the 1992 Act was satisfied.
36. I further note that on supersession from 16 August 2018, the appellant satisfied the conditions of entitlement to the high rate of the care component and therefore that accept that section 73(3)(c) of the 1992 Act was satisfied on the basis of satisfying the condition of section 72(1)(b) and (c).
37. The issue of section 73(3)(b), as explained above, depends on evidence establishing that the appellant exhibits disruptive behaviour which is extreme, regularly requires another person to intervene to physically restrain him in order to avoid injury or damage to property and is so unpredictable that he requires the supervisory presence of another person when awake.
38. Placing most weight on the UNOCINI report, I accept that the appellant requires a high level of supervision to ensure her safety. I observe that she is reported as having decreased danger awareness and requires constant supervision when out in busy environments. I note reports of her attempting to eat inedible things such as clothing, toys and faeces. I note that adaptations have been made to her home, including two raised fences in the garden and raised bannister and landing in her house as the appellant would have attempted to climb over them. Her mother's evidence is that the appellant has to be restrained in a pushchair with 5-point harness when out in public. Otherwise, she described impulsive behaviour such as trying to open the door of a moving car, running into the road to a puddle even where there is busy traffic or being triggered by sudden noises into lying on the ground and lashing out. I accept that this is extreme, unpredictable behaviour that requires regular intervention which meets the requirements of section 73(3)(b) of the 1992 Act.

39. I allow the appeal. There are grounds to supersede the decision dated 21 April 2016, namely relevant change of circumstances. I award the high rate of the mobility component and the high rate of the care component from 16 August 2018 to 3 November 2025 inclusive.
40. [By way of additional explanation, the Department had awarded low rate mobility component from the renewal date of 4 November 2018. The relevant age in section 73(1A)(b) for low rate mobility component is 5, whereas the relevant age for high rate mobility in 73(1A)(a) is 3. Hence, it is appropriate to award high rate mobility from 16 August 2018, whereas it would not have been possible to award low rate mobility from that date.]

(signed): O Stockman

Commissioner

5 May 2021