

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 22 January 2020

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 BE/8369/19/02/D.
2. An oral hearing of the application has been requested. However, I consider that the proceedings can properly be determined without an oral hearing.
3. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and refer it to a newly constituted tribunal for determination.
4. A legal consequence of setting aside the decision of the appeal tribunal is that the appellant no longer satisfies the conditions of entitlement to the mobility component of PIP from 6 April 2018 to 5 April 2021. However, as that period has already passed, it is not of practical effect.

REASONS

Background

5. This appeal addresses whether a tribunal has correctly directed itself as to the meaning of "social support" for PIP activity 9.c in the context of the UK Supreme Court decision in *Secretary of State for Work and Pensions v MM*.

6. The appellant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 6 April 2018 on the basis of needs arising from depression, alcohol and substance dependence, possible adult ADHD and right sided foot drop. The Department obtained a consultant psychiatrist's report and a factual report from his general practitioner (GP). The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 2 August 2018. On 10 August 2018 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 6 April 2018. The appellant requested a reconsideration of the decision, submitting further evidence. Two further supplementary medical reports were obtained by the Department from its medical advisers in response. The appellant was notified that the decision had been reconsidered by the Department but not revised. He appealed. An appeal tribunal decided the case in his absence on 21 June 2019. Subsequently it transpired that the appellant had not received notice of the hearing, which had been delivered to the wrong address. The LQM of the tribunal set aside its decision on 31 July 2019.
7. The appeal was considered by a newly constituted tribunal on 22 January 2020, consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal in respect of the daily living component but allowed it in respect of mobility component, awarding the standard rate for a three-year period. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 8 September 2020. The appellant 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 8 December 2020. By an application received on 11 January 2021 the appellant applied to a Social Security Commissioner for leave to appeal.
8. The appellant was deemed to be late. However, the Chief Social Security Commissioner admitted the late appeal on 31 March 2021.

Grounds

9. The appellant submits that the tribunal has erred in law by conducting an unfair hearing, saying that he was confused and inhibited by medication and did not explain all his circumstances, and that the tribunal had conducted an unfair hearing and made mistakes as to material facts as a result.
10. 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 materially erred in law. She indicated that the Department supported the application on grounds relating to its interpretation of the activity of "Engaging with other people face to face".

The tribunal's decision

11. 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 a consultant psychiatrist's report, a general practitioner (GP) factual report, an audited consultation report from the HCP, further evidence and a GP letter. The tribunal had a written submission from the appellant's representative and various medical records and reports submitted. The appellant attended the hearing, represented by Mr O'Hare and accompanied by Ms Forbes. The Department was represented by Mr Smith.
12. The tribunal observed that the appellant claimed points in relation to mental difficulties and physical difficulties, but that the medical records did not mention physical restrictions. The appellant had claimed to have been shot in both knees in 1991 and to suffer from alcohol and substance addiction with drug-induced psychosis and possible ADHD. It awarded points for the daily living activity 1.d (Preparing food), 4.c (Washing and bathing) and 9.b (Engaging with other people). It declined to award points in disputed activities 5 (Managing toilet needs) and 6 (Dressing and undressing). As this totalled 6 points it did not reach the daily living threshold. It accepted that he scored points for mobility activity 1.d, due to hypervigilance and paranoia. It awarded standard rate mobility component for three years.

Relevant legislation

13. 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.
14. 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.
15. Additionally, by regulation 4, certain other parameters for the assessment of daily living and mobility activities, as follows:

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.

16. A particular activity that is considered in this decision is activity 9. The relevant activity reads as follows:

9. Engaging with other people face to face.

- | | |
|--|---|
| a. Can engage with other people unaided. | 0 |
| b. Needs prompting to be able to engage with other people. | 2 |

c. Needs social support to be able to engage with other people.	4
d. Cannot engage with other people due to such engagement causing either –	8
(i) overwhelming psychological distress to the claimant, or	
(ii) the claimant to exhibit behaviour which would result in a substantial risk of harm to the claimant or another person.	

Assessment

17. 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.
18. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
19. 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.
20. Whereas the appellant makes generalised submissions to the effect that the proceedings were unfair, Ms Patterson for the Department submitted that the tribunal had materially erred in law on grounds relating to its interpretation of the activity of “Engaging with other people face to face”. In light of the Department’s support for the application, I grant leave to appeal.
21. Ms Patterson did not accept that the tribunal had conducted an unfair hearing and submitted that it had conducted the proceedings with fairness and sensitivity to the appellant’s medical conditions. Where she submitted that it may have erred in law was in its interpretation of the expression “social support” in activity 9. She observed that the UK Supreme Court in *Secretary of State for Work and Pensions v MM* [2016] UKSC 34 had addressed the question of whether social support, which was defined in the PIP Regulations as ‘support from a person trained or experienced in assisting people to engage in social situations’, can be given by someone

close to the claimant as opposed to a trained professional and whether the person needed to be present at the time of the social engagement.

22. The tribunal had observed that in the particular case, given the appellant's claim to need someone with him for support to make sure he was safe in a social environment, the tribunal found it inconsistent that he was unaccompanied at the assessment with the DA despite stating that his partner ... had left him to the assessment. It also noted that social support was defined as support from a person trained or experienced in assisting people to engage in social situations. Ms Patterson submitted that the tribunal had confined social support to a narrower meaning than that accepted by the Supreme Court. She submitted that the tribunal had not given reasons for dismissing the role of the named partner as not meeting the definition of social support and that social support could be received prior to the event of social interaction.
23. I agree with Ms Patterson's analysis of *SSWP v MM* and I agree that the tribunal does appear to have adopted a somewhat narrower interpretation of activity 9.c than that of the Supreme Court. The difference of 2 points arising between descriptors 9.b and 9.c is potentially material, as it would increase the applicant's point score for daily living to the relevant threshold for entitlement.
24. I therefore accept that the tribunal has erred in law. I allow the appeal and I set aside the decision of the appeal tribunal.
25. I understand that the simplest approach would be to determine the appeal myself and that there are many factors that would support that approach. Regrettably, however, I consider that further evidence of the nature of the support given would be necessary to determine the appeal. It appears to me that I must set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and refer it to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

26 May 2021