

**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 12 September 2019

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. This is the claimant's appeal from the decision of an appeal tribunal sitting at Cleaver House in Belfast on 12 September 2019 under file reference BE/8543/17/03/D.
2. For the reasons I give below, I allow the appeal under Article 15(8)(a) of the Social Security (NI) Order 1998. I set aside the decision of the appeal tribunal. I make findings of fact and decide that claimant is entitled to the standard rate of both the daily living component and the mobility component of Personal Independence Payment (PIP) for the period from 9 August 2017 to 8 August 2021 (both dates included).

**REASONS**

3. The material background to this appeal can be stated quite shortly. The Appellant, a young woman who is now aged 20, suffers from hearing loss, anxiety and autism (there was an earlier diagnosis of Asperger's). Her mother acts as her Appointee. The Appellant had previously had an award of the middle rate of the care component of disability living allowance (DLA) and the lower rate of the DLA mobility component. In accordance with the usual arrangements, she was then required to make a claim for PIP, as DLA was being withdrawn. The Department's decision-maker decided she qualified for 4 daily living points (for communicating – 2 points for needing an aid or appliance to hear; and engaging with other people – 2 points for needing prompting) and 4 mobility points (for needing someone

to prompt her to undertake a journey to avoid causing her significant mental distress). As a result, the Appellant's PIP claim was refused.

4. The Appellant lodged an appeal with the appeal tribunal, which allowed her appeal. The appeal tribunal concluded that mobility descriptor 1d applied (cannot follow the route of an unfamiliar journey without another person), so awarding 10 points for that activity. The appeal tribunal also decided that the correct descriptor for engaging with other people was 9c (needing social support) not 9b (needing prompting), so the overall daily living score increased to 6 points. As a result the appeal tribunal made an award of the standard rate of the PIP mobility component but no award in respect of daily living. The award was made for the period from 9 August 2017 to 8 August 2021.
5. I interpose there just to observe that the file does not reveal what has happened since. It is therefore unclear whether the duration of the PIP award made by the appeal tribunal has been extended by the Department in the light of the pandemic. The other possibility is that the award has by now expired and a new decision on entitlement has been made, assuming there has been a renewal claim.
6. The Appellant, through her Appointee, then applied to the Commissioner for leave to appeal. In my ruling giving such permission, I observed that the grounds of appeal were for the most part an attempt to re-argue issues of fact. As such, they did not in themselves justify a grant of leave to appeal. I continued as follows (Mr Killeen had lodged a written response on behalf of the Department to the Appellant's application):
  6. However, that is not the end of the matter. In the proposed grounds of appeal the Appointee raises two discrete issues about daily living activity 4 (washing and bathing). One is the safety issue which Mr Killeen has sought to address. The other is the issue of the length of time that is taken. The evidence is that the Applicant showers daily at 9 pm for an hour or so and has to be prompted to get out of the shower. On some days she showers more than once. The PIP Regulations for Northern Ireland specify that "where C's [the claimant'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" (regulation 4(3)(d), emphasis added). A "reasonable time period" means no more than twice as long as the maximum period a person without that disability would normally take to complete that activity (regulation 4(5)). It must ultimately be a question of fact, but I venture to suggest that an hour in the shower may well be more than twice as long as the 'norm'. One industry source suggests that in GB the average person spends 7-8 minutes in the shower (see <https://www.mirashowers.co.uk/blog/trends/revealed->

[what-brits-are-really-getting-up-to-in-the-bathroom-1](#)).

There is no reason to think that the average duration is appreciably longer in Northern Ireland.

7. The decision of Upper Tribunal Judge Gray in GB decision *GP v SSWP (PIP)* [2016] UKUT 444 (AAC) may be relevant in this context. That was an appeal to the Upper Tribunal by the Secretary of State. The claimant in that case suffered from severe OCD. The First-tier Tribunal awarded him a total of 12 daily living points. This included 8 points for descriptor 4g, namely that the claimant could not wash or bathe at all within the terms of the legislation. According to Judge Gray (at paragraph 12):

“The factual findings of the FTT set out in the statement of reasons were that the time that the appellant took to wash and bathe was more than twice the time somebody without the disorder would take, and that entitled him to eight points under activity 4g, the maximum for the activity.”

8. The Secretary of State’s appeal in *GP v SSWP (PIP)* was dismissed on another point. However, there is nothing in Judge Gray’s decision to suggest that she considered there was anything amiss with the FTT’s conclusion on the facts about daily living activity 4. Even if descriptor 4g did not apply for some reason, it must also be arguable that in the alternative in the present case the Applicant needs prompting to finish the shower and so would perhaps qualify for 2 points under descriptor 4c, which would have been sufficient to satisfy the requirement for the standard rate of the daily living component.

9. In the light of that case law, is it arguable the appeal tribunal failed to make findings of fact as regard the test in regulation 4(3)(d) in the context of daily living activity 4 (washing and bathing)?

7. I therefore gave Mr Killeen the opportunity to address this new point (or at least this expanded original point). In his helpful further submission (dated 15 July 2021), Mr Killeen acknowledges that if the Appellant was only able to shower within a reasonable timeframe with prompting, she would satisfy descriptor 4c. The effect of the additional 2 points is that she would have been entitled to the daily living component at the standard rate. Mr Killeen argues that the appeal tribunal did not fulfil its inquisitorial duty by querying the length of time that the Appellant spent in the shower. He adds that the same point could apply to the activity of dressing and undressing, as there was no indication that the appeal tribunal had addressed the reasonable time test in that context, whether explicitly or implicitly. He concedes that

the Appellant's ritualised behaviour might lead to an award of a further 2 points for descriptor 6c. In conclusion, Mr Killeen asks that I allow the appeal, set aside the tribunal's decision and remit the matter to a fresh appeal tribunal for a re-hearing of the original appeal and further investigation.

8. The Appointee has responded by letter on those various issues. The main issue on which she parts company from Mr Killeen is her contention that the matter should be decided by the Commissioner rather than being remitted to a fresh tribunal. She considers that remittal would be unfair on her daughter.
9. The parties are now agreed that the appeal tribunal's decision involves an error of law. In short, that involved a failure to adopt a sufficiently inquisitorial role in relation to daily living activities 4 and 6. In particular, the appeal tribunal did not adequately address the reasonable time test in the context of those two activities. I therefore allow the Appellant's appeal and set aside the decision of the appeal tribunal.
10. As to the issue of remittal or re-making, I am with the Appointee, for the following reasons. First and foremost, I consider that the further delay involved with remittal would be unfair on the Appellant. I bear in mind that the whole business will have been stressful given her diagnoses of anxiety and autism. I also bear in mind that she had to undergo two HCP assessments in quick succession through no fault of her own, which will only have added to her anxiety. Secondly, I am conscious this appeal is in practice concerned with a past and closed period. Thirdly, and in any event, and while recognising that the appeal tribunal is the primary forum for fact finding, I consider there is sufficient evidence on file to decide and dispose of this appeal fairly.
11. I turn then to the activity of washing and bathing. I am satisfied on the evidence that the Appellant spends about an hour every evening in the shower, starting at 9 p.m. I find that as a fact. Given people typically spend 7-8 minutes on average in the shower (see the industry source cited above), the duration of the Appellant's shower is well over twice the 'norm'. I am also satisfied that she requires prompting to desist from showering. The \$64,000 question on this appeal may then be framed thus – is the fact that the Appellant spends an hour in the shower every night and has to be prompted to come out a matter of choice or related to her condition of autism (and anxiety)? I am satisfied on the balance of probabilities that it is the latter. The Appointee's evidence about her daughter's showering routine has been consistent on this issue throughout. The Appellant herself explained as follows on her PIP claim form: "I tend to have a compulsion with washing thoroughly therefore I would need another person to, for example, tell me to get out of the shower when I have been in too long, otherwise I would just stay in there. This compulsion is time consuming and means I need another person to remind me when enough is enough." The medical evidence in the report by Child & Adolescent

Assessments (NI) is also compelling, detailing restricted, repetitive and stereotyped patterns of behaviour, including in showering.

12. Mr Killeen has helpfully undertaken his own further research on the industry report referred to when I gave leave to appeal. He noted that apparently 70 per cent of 18-24 year olds (a cohort that obviously includes the Appellant) multitask in the shower: "Tasks included in multitasking appeared to vary considerably from washing teeth and shaving to singing and using a smartphone. Although the former 2 tasks may appear to be related to the activity Washing and Bathing, they do not fall under the scope of this activity". I am satisfied that if the Appellant, for example, sings in the shower, she is not pursuing a leisure activity, but rather acting out the type of repetitive and stereotyped pattern of behaviour which is typical of autism. I am also satisfied that on the majority of days the Appellant cannot complete her shower within a reasonable timeframe without being prompted by a member of her family. She qualifies for descriptor 4c and 2 points for this activity.
13. In the circumstances I do not consider it necessary to reach a definite conclusion on the activity of dressing and undressing. It may well be that the Appellant satisfies one or other head of descriptor 6c but it would make no difference to the outcome of this appeal. This is because the most the Appellant could be awarded would be 2 points, which would give a total of 10 points overall. This would make no difference to the award of the standard rate of the daily living component.
14. In all other respects I adopt the findings of fact and reasons of the original appeal tribunal, in what is otherwise a commendably clear and systematic analysis of the evidence. I therefore also agree that the Appellant qualifies for 10 points for mobility descriptor 1d.
15. I accordingly re-make the appeal tribunal's decision in the following terms:

The Appellant's appeal against the Department's decision dated 11 July 2017 is allowed. She scores 10 points for mobility (descriptor 1d) and a total of 8 points for daily living (descriptors 4c, 7b and 9c). She is accordingly entitled to the standard rate of the PIP mobility component from 9 August 2017 to 8 August 2021. She is also entitled to the standard rate of the PIP daily living component from 9 August 2017 to 8 August 2021. The matter is remitted to the Department to make the necessary calculations in terms of arrears due and to deal with any consequential matters.
16. I therefore allow the Appellant's appeal, set aside the appeal tribunal's decision and re-make the decision under appeal in the terms as set out above.

17. For the avoidance of doubt, I should just make it clear that my decision has no precedent value so far as the actual facts are concerned. It follows that, for example, any renewal claim that may have been made will need to be determined on the facts as they are found to be at the date of the new decision. On any new claim the daily living and mobility scores may be more, less or the same as before.

A handwritten signature in black ink, appearing to read 'N. Wikeley', with a long horizontal flourish extending to the right.

(Signed): N WIKELEY

DEPUTY COMMISSIONER (NI)

15 September 2021