

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 April 2021

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/2277/18/03/D.
2. 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. 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 8 November 2010, most recently at the low rate of the mobility component and the middle rate of the care component. As her award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, she claimed personal independence payment (PIP) from the Department for Communities (the Department) from 18 October 2017 on the basis of needs arising from Crohn's Disease, hiatus hernia, depression, anxiety, osteoporosis and rheumatoid arthritis. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 13 November 2017. She asked for evidence relating to her 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 5 January 2018. On 12 January 2018 the Department

decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 18 October 2017. The applicant requested a reconsideration of the decision, disputing the content of the HCP report and indicating that she had answered all the HCP's questions as her mother was incapable. She was notified that the decision had been reconsidered by the Department but not revised. She appealed, but waived the right to attend an oral hearing of the appeal.

4. The appeal was listed for hearing on 6 July 2018, but the LQM adjourned and directed an oral hearing in the applicant's interests. After further adjournments for various reasons, the appeal was considered on 22 April 2021 by way of a telephone hearing 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 8 June 2021. 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 20 August 2021. On 16 September 2021 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The applicant, represented by her daughter, submits that the tribunal has erred in law by:
 - (i) failing to make adequate findings of fact;
 - (ii) failing to address conflicts in evidence;
 - (iii) taking irrelevant matters into account.
6. The Department was invited to make observations on the applicant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted that the tribunal had materially erred in law. He 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 what it referred to as "Appeal papers". I understand this to be a reference to the Department's submission, containing a PIP2 questionnaire completed by the applicant, a consultation report from the HCP, a GP factual report prepared in 2014 for DLA purposes and correspondence. I further understand this to include a 24-page submission from the applicant's daughter, general practitioner records produced in response to an earlier LQM's direction, an earlier 27-page submission from the applicant's daughter, a supplementary Departmental submission and

a supplementary advice note from a HCP. As the applicant had waived her right to an oral hearing, the proceedings did not involve oral evidence and the appeal was decided on the papers.

8. The tribunal found that the applicant had Crohn's disease, attending gastroenterology as a result, that she had osteoarthritis (as opposed to rheumatoid arthritis stated in the self-assessment questionnaire) affecting her manual dexterity, and that she suffered from anxiety and depression. It observed that medical records indicated that her mood was stable and managed by her GP. Gastroenterology reported that the applicant was doing well, with her condition being stable and asymptomatic. It noted that there had been no specialist referral for treatment of osteoarthritis and no diagnosis of rheumatoid arthritis. It observed that the HCP had visited the applicant at home, reporting that she could manage most daily living tasks independently.
9. The tribunal found that the applicant would have difficulty planning and following journeys, awarding 4 points for mobility activity 1.b, but that she had no relevant physical disability moving. It accepted that she would have a need for prompting to meet other people due to anxiety, awarding 2 points for daily living activity 9.b, but that she had no other relevant daily living needs. It therefore disallowed the appeal.

Relevant legislation

10. 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.
11. 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.
12. 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.

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 applicant's daughter expanded on the grounds summarised above by submitting that the tribunal was misled by the HCP report, on the basis that she was the person who supplied all answers to the HCP's questions in her mother's presence, whereas the answers she gave were attributed to her mother in the HCP report. She made specific submissions of fact relevant to various descriptors.
17. The basis for the Department's support for the application lies in the tribunal's treatment of the submission advanced by the applicant's daughter to the tribunal. In that submission, which made lengthy criticism of the HCP report, the applicant's daughter principally indicated:

“I continue to be dismayed by the assertion made by the medical professional that my mother spoke throughout her assessment showing articulation, cognition and understanding. I have repeated this on many occasions but feel that it warrants being stated again; my mother did not answer the questions during her medical assessment. I answered the questions on her behalf. This was not recorded competently by the medical professional who in his reports falsely attributed quotes and statements to my mother instead of me.”

18. Mr Killeen referred to the decision of Upper Tribunal Judge Gray in *MW v SSWP* [2016] UKUT 76, where a tribunal had failed to deal with criticisms of a HCP report. He submitted that the tribunal had a duty to acknowledge the lengthy criticism of the present HCP in its reasoning, even briefly. He accepted that it was arguable that more points could have been awarded for daily living activities, leading to an award.
19. I agree with the submission of Mr Killeen, supporting the application. It is not evident to me that the tribunal has engaged at all with the persistent criticism of the HCP's report levelled by the applicant's daughter. While it acknowledges having seen the submission of the applicant's daughter, it has not addressed the key issue raised by her in the course of at least three separate submissions that her mother had not engaged with the HCP, but rather that she had herself.
20. There are plainly difficulties for a tribunal assessing the credibility of an account when it is presented on paper and when there is no opportunity to see and hear a witness in person. However, that does not mean that it can simply fail to address an issue. The applicant's daughter had consistently challenged the reliability of the HCP's report on a specific basis. This submission was significant in terms of the reliability of the HCP report. The fact that the tribunal did not address the submission indicates that it did not deal with a crucial conflict arising before it. This was an error of law.

21. I consider that I should grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

2 February 2022