

**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 24 November 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 LD/8669/19/02/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.
3. This outcome has the implication that the appellant no longer satisfies the conditions of entitlement to the standard rate of the mobility component of PIP from 22 May 2019 to 21 May 2024.

**REASONS**

**Background**

4. The appellant had previously been awarded disability living allowance (DLA) from 15 August 2011, most recently at the low rate of the mobility component and the middle rate of the care component. His mother had been appointed to act on his behalf in respect of that claim in November 2013. As his award of DLA was due to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, he was invited to claim personal independence payment (PIP) by the Department for Communities (the Department). He failed to claim PIP and his claim for

DLA was suspended. He then claimed PIP from 22 May 2019 on the basis of needs arising from autistic spectrum disorder.

5. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 9 July 2019. A general practitioner (GP) factual report was received on 26 July 2019. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 22 August 2019. On 18 September 2019 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 22 May 2019. The appointee requested a reconsideration of the decision, submitting further evidence. The appellant was notified that the decision had been reconsidered by the Department but not revised. He appealed.
6. The appeal was considered at a hearing on 24 November 2021 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal in respect of daily living component, but allowed it in respect of mobility component, awarding standard rate mobility component from 22 May 2019 to 21 May 2024. The appointee requested a statement of reasons for the tribunal's decision and this was issued on 31 January 2022. 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 8 June 2022. On 27 June 2022 the appellant applied to a Social Security Commissioner for leave to appeal.

### **Grounds**

7. The appointee, represented by the appellant's uncle, submits that the tribunal has erred in law by:
  - (i) failing to take account of relevant medical evidence;
  - (ii) failing to ensure compliance with a direction to the Department to provide information about the appointee-ship;
  - (iii) failing to ensure compliance with a direction to the Department to provide a presenting officer and thereby failing to provide fair proceedings;
  - (iv) failing to consider the implications of the Department's acceptance of the appointee-ship for the award of points under daily living activities 7 (Communication), 8 (Reading), 9 (Engaging with others) and 10 (Making budgeting decisions);
  - (v) failing to address the issue of whether the process of calling the appellant to a HCP consultation involved adopting an unfair procedure in conflict with the Department's own guidance;

- (vi) misdirecting itself as to whether the appellant's interactions with other people fell below an acceptable standard and basing its conclusions on no evidence;
  - (vii) misdirecting itself as to the application of the descriptors in activity 9 and failing to address the appellant's interactions with people in general and not just those he knew well;
  - (viii) failing to give adequate reasons in relation to activity 10;
  - (ix) basing conclusions regarding activity 1 (Preparing food) on no evidence and unfairly;
  - (x) failing to address the consideration that evidence had been sought from the appellant's GP that was not shared with him – a procedure criticised by the Public Services Ombudsman;
  - (xi) failing to address whether the HCP evidence was obtained in compliance with PIP legislation.
8. The Department was invited to make observations on the appellant'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 support was offered on the basis that the tribunal had not made sufficient findings or given adequate reasons in relation to activity 9. He also accepted that the tribunal had not engaged fully with the implications of the appointee-ship for activity 10 (Making budgeting decisions).
9. The appointee in turn responded, welcoming the concessions made in respect of certain grounds, but submitting that the Department had not addressed itself to a number of the grounds originally advanced.

### **The tribunal's decision**

10. 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, including the PIP2 questionnaire completed by the appellant, a factual report from the appellant's GP and a consultation report from the HCP among other documents. The tribunal appears to have been provided with significant material from the appellant's medical records and a number of written submissions on his behalf. The appointee attended the hearing and gave oral evidence along with the appellant's uncle as representative. The Department was not represented.
11. The appointee indicated that the appellant felt that there was nothing wrong with him. The tribunal referred to the medical records and educational assessments provided but found that these mostly dated back

several years. The tribunal observed that the self-assessment questionnaire indicated significant levels of difficulty but that the oral evidence to tribunal indicated a lesser level of difficulty or none. It addressed the daily living activities, noting that the appellant worked in a fast food restaurant and had obtained a first class university degree. It found that he engaged with other people in a different way, but not below an acceptable standard. It declined to award points for making budgeting decisions. Awarding no points for daily living activities, the tribunal nevertheless accepted that the appellant should score 10 points for mobility activity 1.d, awarding standard rate mobility component.

### **Relevant legislation**

12. 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.
13. 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.
14. 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**

15. 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.
16. 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.
17. 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.
18. The appointee has set out a number of detailed grounds in submissions. While the Department does not agree with all of these, Mr Killeen accepts that the tribunal has erred in law in some respects, notably with regard to daily living activity 9 and activity 10.
19. The first of these is concerned with the appellant’s ability to engage with other people. The evidence tended to indicate that the appellant had social difficulties arising from Asperger’s syndrome. The tribunal characterised the appellant’s interaction with other people as “different from most

people”, and accepted that he had one or two friends, with no evidence of difficulties with work colleagues. It considered that his interactions with other people were not below an acceptable standard, awarding no points for activity 9.

20. Mr Killeen pointed to medical evidence indicating that the appellant had “difficulty with strangers”. He noted the relevant case law and referred to paragraphs 17 and 18 of Chief Commissioner Mullan’s decision in *AH v Department for Communities* [2019] NI Com 20, where he endorsed the principles adopted in a number of Great Britain Upper Tribunal cases, and in particular the need to address the question of whether claimants could engage with people generally and not just those they know well. He submitted that the tribunal had not sought to ascertain whether he had such difficulties, for example when starting university.
21. Mr Killeen further referred to some of my own decisions where I explored the evident inconsistency between the Department making an appointment of a third party to act for the – in this case a 21-year old – claimant while not accepting at the same time that he might attract points for activity 10 (Making budgeting decisions) or for that matter, activities 7, 8 or 9. I had raised this question in *UB v Department for Communities* [2020] NI Com 55 and *DO’S v Department for Communities* [2021] NI Com 23. At paragraph 19 of *UB v DfC* I had indicated that where an appointment had been made, some further explanation might be required from the Department as to why points were not awarded for relevant and related activities.
22. Here the appointee continues to act for her 23 year old son. He apparently takes the view that there is “nothing wrong” with him. It may well be that this view is correct or it may be the case that he lacks insight into his own difficulties. I do not know which. However, the requirements for appointment by the Department of a third party to act on a claimant’s behalf include that that person is unable for the time being to act and no controller has been appointed by the High Court with power to claim or, as the case may be, receive benefit on his behalf. This is, or should be, a high hurdle. The fact of the appointment of the adult appellant’s mother as his appointee indicates that the Department accepts that he lacks capacity to act on his own behalf. This may well be a surprising proposition in a case where the claimant has recently attained a first class honours university degree, but the Department has not sought to explain the apparent inconsistency. It may be that the appellant can function well at intellectual processing activities but lacks basic daily living skills. In any event, the tribunal did not engage with this issue at all. In the light of evident conflict between the Department making an appointment on the basis of incapacity and the lack of any consideration of the implications of this for relevant daily living activities, such as activity 10 (Making budgeting decisions), I consider that an error of law arises.
23. I grant leave to appeal. I observe that each of the parties submits that the tribunal has erred in law. I agree with the parties and I allow the appeal. I

set aside the decision of the appeal tribunal and refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

23 November 2022