

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 December 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 DG/5485/20/02/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. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The appellant (then aged 16) claimed personal independence payment (PIP) from the Department for Communities (the Department) from 31 July 2020 on the basis of needs arising from developmental coordination disorder and sensory processing disorder. His mother (the appointee) was appointed to act for him. The appellant was asked to complete a PIP2 questionnaire to describe the effects of his disability and he returned this to the Department on 20 August 2020. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 7 October 2020. On 8 October 2020, the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 31 July 2020. The appointee requested a reconsideration of the decision, submitting further evidence. A supplementary advice note was obtained by the Department. The appellant was notified that the decision had been reconsidered by the Department but not revised. He appealed.

4. The appeal was considered at a hearing on 22 December 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. The appellant then requested a statement of reasons for the tribunal's decision, and this was issued on 3 May 2022. 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 19 July 2022. On 5 August 2022, the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The appellant submits that the tribunal has erred in law by:
 - (i) Applying the wrong legal test and giving insufficient reasons in relation to daily living activity 1 (Preparing a meal);
 - (ii) giving inadequate weight to evidence regarding activity 4 (Washing/bathing);
 - (iii) failing to give adequate reasons in regard to activity 6 (Dressing/undressing);
 - (iv) disregarding evidence of appointment when considering activity 10 (Making budgeting decisions);
 - (v) having regard to irrelevant matters when addressing mobility activity 1;
 - (vi) failing to give adequate reasons in the context of a previous DLA award.
6. 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 appointee duly responded to the Department's observations.

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 the Department's submission, containing the PIP2 questionnaire completed by the appellant, a consultation report from the HCP, supporting medical evidence and corresponding supplementary advice notes from a HCP. It also had sight of a letter from an autism intervention therapist. The appellant and the appointee participated by

way of a telephone connection, and each gave oral evidence. The Department was not represented.

8. The tribunal accepted that the appellant had developmental coordination disorder, sensory processing difficulties, autism spectrum disorder and sleep problems. It addressed each of the daily living and mobility activities. It accepted that the appellant had difficulty engaging with others and awarded 4 points for descriptor 9.c. It did not accept that he had any other restrictions and awarded no further points. As he had scored below the relevant threshold of each component, the tribunal disallowed the appellant's appeal.

Relevant legislation

9. 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.
10. 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.
11. 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

12. 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.
13. 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.
14. 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.
15. I will turn to the last of the appellant’s grounds first, as this is a matter which has been addressed in Commissioners’ decisions before now. By this ground, the appointee submits that the tribunal erred in law by failing to give adequate reasons to not awarding PIP in the context of a previous DLA award. There had been a short break between the award of DLA and the current claim for PIP. Possibly for this reason, the initial Departmental submission to the tribunal did not offer details of the previous DLA award. However, a supplementary submission was directed by the tribunal, and

this indicated that the appellant was awarded the middle rate of the care component of DLA from August 2016 to April 2020. This would have been roughly from the just below the age of 12 to the age of 16 and a half.

16. At paragraph 16 of *NE v Department for Communities* [2020] NI Com 45, at paragraph 16, I had referred to cases dealing with the same submission in the context of DLA mobility component. I had said:

“... However, for the reasons stated most recently in *JF-v-Department for Communities* [2019] NI Com 72 and *LMcC v Department for Communities* [2020] NI Com 19, I reject this ground. In those cases, I held that there was no automatic requirement on a tribunal to explain a refusal of PIP mobility component in the context of an appellant who held a previous DLA high rate mobility award unless the case involved some obvious inconsistency that required particular elucidation. The simple fact of the matter is that the rules of entitlement for DLA mobility component and PIP mobility component are different, following a political decision to change them”.

17. I consider that the same principle applies in the context of the DLA care component. If anything, there is a starker contrast between the former DLA rules based on need for attention in connection with bodily functions or supervision to avoid substantial danger and the ten activity groups with specific descriptors in the context of PIP. They are different benefits, and their rules of entitlement are different. There is no requirement on a tribunal to give reasons for departing from a previous DLA care component award, which was grounded on entirely different rules of entitlement to those applying in the case of the PIP daily living component. I refuse leave to appeal on this ground.
18. However, if I am wrong about that, it appears to me that another factor would remove a need to explain any difference in the two awards. This is that DLA was awarded to the appellant when he was a child aged 12, whereas the appellant was a 17 year old at the date of the PIP decision. I consider that it is obvious that the level of the appellant’s needs will have changed with age and consider that no further explanation is necessary in that context.
19. In the grounds brought before me, the appointee submits that the tribunal has erred in relation to a number of activities. The first of these is daily living activity 1 (Preparing food). She submits that the tribunal applied the wrong legal test, by considering the appellant’s ability to prepare ready meals as opposed to freshly prepared ingredients, and that it failed to explain why it considered that he had no need of supervision/encouragement to prepare meals. For the Department, Ms Patterson submitted that the tribunal reached reasonable conclusions, saying that although the appellant may overcook food it would not be unsafe to eat it. The appointee made the rejoinder that overcooked or

burnt food, while safe to eat, would not be cooked “to an acceptable standard” for the purposes of regulation 4(3) of the PIP Regulations.

20. The tribunal records that the appellant had told the HCP that he worries about food being undercooked and related that he would prepare ready meals and could cook sausages on the pan. The tribunal indicated that it had formed the impression that he could cook for himself and, taking all the evidence into account, that he could prepare and cook a simple meal unaided. The appointee had related instances of food being burned in a grill by the appellant through lack of concentration. However, in a previous HCP consultation the appellant had stated that he was aware of dangers in the kitchen and would ensure that he had turned off the cooker.
21. Whereas the appointee submitted that the tribunal had applied the wrong legal test, referencing ready cooked meals as opposed to meals with freshly prepared ingredients, there is nothing in the evidence to indicate that the appellant could not prepare fresh ingredients. It explained its conclusions by reference to the general evidence before it. While I accept that burnt food would not be cooked “to an acceptable standard,” the evidence did not indicate regular burning of food, but rather mentioned one-off events, and there is no indication that the appellant regularly burned food in the evidence before the tribunal. I do not accept that the tribunal has erred in law on this ground.
22. The second ground advanced by the appointee is that the appellant required cue cards on the wall to prompt him to wash correctly, but that the tribunal did not mention these. It was submitted that he only washed every 3-4 days and that this did not amount to performing the activity of washing to an acceptable standard. Ms Patterson submitted that the tribunal found that the appellant was able to shower, and that he preferred to do so every few days. She submitted that the dispute about how often the appellant should shower was between the appellant and the appointee. For its part, the tribunal considered that showering every 3-4 days was not unreasonable.
23. It appears to me that the evidence indicated that the appellant was able to wash and shower, and that the only issue in contention was a difference between himself and the appointee about how often he should do it. To the extent that the cue cards referred to were relevant, it was as an aid to performing the activity. However, there was no evidence as to whether the cards had any effect on the appellant’s performance of the activity of washing.
24. The tribunal’s finding that showering every 3-4 days was not unreasonable has to be assessed in a context of whether it is to an acceptable standard. At an individual level, I consider that what is acceptable has to be gauged in terms of preventing health risks due to poor hygiene. At social level, I judge that what is acceptable has to be gauged in terms of the maintenance of general community standards of hygiene, such as avoiding body odour or a dirty appearance.

25. On a point of law application, such as the present one, the Commissioner is not rehearing the merits of the case but assessing whether the tribunal made errors of law. A tribunal has a margin of appreciation for its decisions and will only err if it reached a decision on the evidence that no reasonable tribunal could reach. However, I consider that the tribunal was entitled to hold that daily showering was not required to maintain an acceptable standard of hygiene. Equally, I cannot hold that it reached a conclusion that was outside the range of decisions open to, it when it found that showering every 3-4 days was not unreasonable. Therefore, I must refuse the application on this ground.
26. The third ground advanced by the appointee was that the appellant would not change his clothes unless she left a clean change of clothes out for him. The tribunal found that he could dress and undress independently. The appointee submits that it has erred in law by failing to explain why prompting or assistance was unnecessary for him. She submitted that it was only because she left clean items for him that the appellant changed his clothes. The appointee essentially submitted that the appellant fell within descriptor 6(c)(ii), namely that he required prompting or assistance to be able to select appropriate clothing.
27. The issue of whether clothing is appropriate has been considered previously in connection with whether they are appropriate for weather conditions, whether they are culturally appropriate or whether they are appropriate for particular circumstances or events. That is to say, whether the clothing in issue is appropriate is judged against clothing of a different type which is not appropriate. On the same principles as applied above to the activity of washing and bathing, I consider that it is arguable that an item of clothing may be inappropriate if it has an odour or dirty appearance such that wearing it would fall below general community standards.
28. Here the appointee submitted that the appellant changed his clothes only because she put fresh clothes out for him each day. However, there was no evidence that the appellant would not otherwise change his clothes if they became smelly or dirty. The tribunal found that the appellant could dress and undress. I note his evidence that he knew when clothes were dirty and that he would change a t-shirt if it was dirty. The appointee submits that this is only because she would leave one on his bed. However, I consider that on the evidence, the tribunal was entitled to reach the conclusion that the appellant did not satisfy a scoring descriptor within this activity.
29. The appointee submitted that the appellant needed help with making complex budgeting decisions. She submitted that she had been appointed to act for the appellant because of his lack of capacity. She submitted that the tribunal wrongly disregarded the evidence of her appointment when considering activity 10. For the Department, Ms Patterson noted the evidence given to the tribunal by the appellant. She referred to my decision in the case of *UB v Department for Communities* [2020] NI Com 55.

30. Ms Patterson referred to paragraph 34 of that decision, where I observed that a tribunal was not bound in any way by the decision of the Department to make an appointment. Nevertheless, the tribunal in that particular case had addressed the issue of appointment and considered that it was made by the Department in error. However, in the present case, the tribunal has not referred to the issue of appointment at all.
31. In *DO'S v Department for Communities* [2021] NI Com 23, I had said
- “20. Further, as addressed in *UB v DfC*, while I consider that the fact of appointment is not binding on a tribunal as evidence of incapacity, it seems to require some further explanation by the Department as to why - if it accepts that an adult claimant is incapable of acting on his own behalf - it has not awarded any points under the potentially related activity 10 (“Making budgeting decisions”) in PIP cases”.
32. It appears to me that the particular issue is engaged in the present case. A finding that someone lacks capacity raises issues that need to be addressed when considering the applicability of activity 10. As the appointee says, “if [the appellant] was incapable of managing his benefit claim, how was he able to make complex budgeting decisions?”
33. I consider that there is merit in this ground. I grant leave to appeal. I allow the appeal on this ground.
34. The appellant relied on further grounds relating to the tribunal having regard to irrelevant matters when addressing mobility activity 1. In the light of the determination I have made, I do not propose to address the particular ground. However, that is without prejudice to the possible merits of the ground.
35. I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

11 January 2023