

**SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992**

**SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998**

**PERSONAL INDEPENDENCE PAYMENT**

Application to a Social Security Commissioner  
for leave to appeal on a question of law from the decision of a Tribunal  
dated 25 January 2023

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

I grant leave to appeal. I deal with the substantive appeal, which I allow. I set aside the decision of the Tribunal sitting at Dungannon on 25 January 2023 as being in error of law. I remit the matter back to a freshly constituted Tribunal with the following directions.

**Directions**

1. The fresh appeal will be listed before a new tribunal, that is, one with none of the same members as previously. It will be listed as an oral hearing, and it is in the claimant's interests to attend, either in person, by phone or virtually, as he prefers, or as is practical.
2. He must tell the Appeals Service (TAS) in writing (post or email as is usual) which sort of hearing he would prefer within 14 days of the issue of this decision.
3. He should understand that the tribunal is looking at how his medical conditions affected his function during the qualifying period before the decision under appeal. The tribunal can consider things that have happened since then only if they shed light on what the position was likely to have been at the date of the Department's decision.
4. A Chairman of TAS may make any further necessary listing directions.

## **REASONS**

### **Proceedings before the Commissioners**

1. As I am granting the application for leave to appeal, I refer to the applicant as either the appellant or the claimant.
2. The tribunal decision before me adopted the conclusion of the decision maker as to there being no entitlement to the Personal Independence Payment (PIP) daily living component. In contrast to the decision maker, however, it awarded the mobility component at the standard rate for a period of three years and a total of five points under the daily living descriptors.
3. The application for leave to appeal to the Commissioner was refused by the legal member of the tribunal that heard the appeal. I am looking again at that application.
4. The appellant is in person, and Ms Patterson acts for the Department. An oral hearing is not necessary for justice to be done. I am able to decide the matter fairly on the papers before me.
5. The Department has had the opportunity to make observations through Ms Patterson. Although she does not support the appeal, she is content that I decide it without further reference to the Department if I grant leave.
6. In all the circumstances I am able to deal now with both the application for leave and the substantive appeal.

### **Background**

7. The appeal was about entitlement to PIP. The appellant's main health problems date from a traumatic injury in 2018, in which he sustained a crushing injury to his foot. The physical problems persist alongside an anxiety disorder which he did not suffer from before the accident. He made his claim for PIP on 20 September 2021, and underwent an assessment over the telephone on 21 December of the same year. The healthcare professional who spoke to him was of the view that no points were merited either for the problems in daily living activities or under the mobility descriptors. On 31 January 2022 the decision maker accepted that recommendation.
8. Following the mandatory reconsideration procedure on 1 June 2022, which didn't change that decision, the claimant appealed; the appeal was heard on 25 January 2023.
9. The tribunal awarded points under the daily living activities for difficulties in bathing, 4e, 3 points, and two further points, the genesis of which is unclear, but I ascribe them to activity 9b. The requirement of eight points for the standard award of the daily living component was not met. The

award of mobility was made under activity 2c, 8 points. The tribunal went on to consider whether further points might be scored under the other mobility activity for difficulties in following a route, but its conclusion was in the negative.

### **The arguments of the parties**

#### **The appellant**

10. The appellant has made a thorough application, identifying areas in which he argues that the tribunal erred in law as follows:
  - (i) The tribunal made perverse findings of fact in two instances: firstly, they state the appellant takes sertraline, and secondly that he is able to attend classes and courses without difficulty.
  - (ii) The tribunal gave insufficient reasons, stating that the appellant has a condition capable of improvement with further physiotherapy and with the use of orthotic aids, and awarding him the mobility component for a three year period. It is contended that does not reflect the reality of living with chronic pain, muscle wasting and stress.
  - (iii) The tribunal's finding that he has been discharged from, and currently receives no input from a specialist is incorrect.
11. I will return to these in so far as it is necessary below.

#### **The respondent**

12. In her submission Ms Patterson sets out the appellant's arguments, and deals with them in turn. Much of what she argues accepts that errors were made by the tribunal, but, she says, the errors were not material.
13. She offers a further issue as a potential error although again she rejects it as immaterial. That is a matter I refer to above as the unexplained genesis of the two-point score under the daily living descriptors. Ms Patterson brought to my attention the fact that the decision notice issued by the tribunal, insofar as it related to the daily living component, showed that the tribunal made no-point awards for all activities apart from activity 4 washing and bathing, where the 3 point scoring descriptor 4e was selected, and activity 8, when the 2 point descriptor 8b was selected. Activity 8 involves reading and understanding signs, symbols and words: there was little indication in either the claim form or the other evidence that such difficulties were being put forward.
14. It has been helpful for Ms Patterson to raise this matter, and I thank her for taking the trouble to seek clarification from TAS of the handwritten decision notice as against the typed version: they were found to be the same. She has also included a reference to decided case law where it is established

that a difference between what is set out in the decision notice and the written reasoning can amount to an error of law. In this case, however, it is likely that the decision notice contained a mere typographical error, because the statement of reasons makes it abundantly clear that there was no difficulty in relation to reading and understanding signs, symbols and words, and, given the extremely low expectations of the level of reading or understanding required, other matters referred to in the appellant's evidence, such as his managing an online bank account, make this the most likely explanation.

15. Although my setting aside the decision means that if this was a problem, it no longer is, I believe that the decision notice almost certainly referred to activity 9b. The appellant had explained that he has, since the accident in 2018, had problems engaging with others. The extent of these will be something for the fresh tribunal to decide, as I explain below that the tribunal's approach in relation to its reasoning about this descriptor amounts to an error of law.

### **The arguments discussed**

16. Some of the matters put forward on behalf of the appellant as errors by the tribunal are no longer problematic as I am setting aside its decision. Others will be matters for the next tribunal to consider and make findings about. In particular the prescribed medication being taken at the relevant dates and whether he was being treated or had been discharged by the different clinicians, and the effect these matters may have had on what the tribunal needs to determine. The tribunal has the medical notes, and the expertise as to their interpretation.

### **My conclusions on the differing arguments**

17. I need say little more about the detailed points made, as I am allowing the appeal principally for different reasons to those put forward. I find that there were legal errors by the tribunal that may have been material to the outcome; put another way, they are mistakes that matter, at the end of the day.

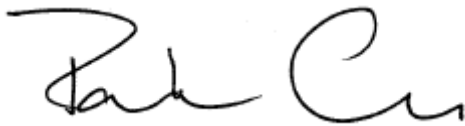
### **The errors of law here**

18. I understand the appellant's concerns in relation to mobility activity 1. The tribunal has at least failed to explain what it made of the appellant's contention that he did not take up the opportunity to join a physiotherapy class for lower limb problems due to anxiety about the journey to a nearby town where it was held. He feels, I think with justification, that there may have been some misunderstanding of his explaining that he could leave the house to go to a local shop, but would have difficulties in making the journey to Dungannon. There are a number of references in the statement to reasons to the tribunal accepting the evidence of the appellant on different issues, and if they rejected his evidence on this, they should have dealt with why that was.

19. Activity 9, engaging with other people, was clearly raised and considered during the hearing. As I have said above the tribunal said in its reasons that (despite the aberrant decision notice) it accepted the appellant had difficulties engaging with other people, meriting two points as he needed to be prompted to engage. What it did not do, however, was to explain why prompting was the descriptor of choice rather than one of the higher scoring descriptors.
20. I mention at this stage, for the benefit of the fresh tribunal, the Supreme Court decision in *Secretary of State for Work and Pensions v MM* [2019] UKSC 34, in which the differences between 9b and 9c, prompting and social support are explained. In highlighting that, I do not mean to exclude any consideration of the higher point descriptors.
21. A further matter that has not been mentioned previously but which I consider to be a material error is that in its explanation for the lack of any points in respect of dressing, the tribunal makes specific reference to the fact that the appellant “wears loose-fitting socks to assist him with this”. The tribunal also mentions an apparent qualification in relation to putting on shoes, the appellant stating that this could, at times, be sore.
22. In Part 1 of the Schedule to the PIP Regulations, Interpretations, sets out that “dress and undress” includes put on and take off socks and shoes. It is not necessary to have problems with both putting on and taking off; difficulties with either are sufficient.
23. The new tribunal can take evidence as to why the appellant needs to wear loose socks, and generally how he accomplishes putting them on and taking them off.
24. *PE v Secretary of State for Work and Pensions* [2015] UKUT 309 (AAC) was about a person who managed dressing and undressing by wearing “easy to wear” clothing. Upper Tribunal Judge Jacobs established that one can neither elevate the degree of disability by insisting on wearing clothes that are difficult to manage, nor be expected to reduce the level of one’s disability by wearing only loose fitting and elasticated clothes. In England and Wales the DWP PIP Assessment Guide makes reference to the use of “un-adapted” clothing.
25. The new tribunal will need to investigate this issue of how the appellant manages socks using Judge Jacobs’ approach of looking at the ways in which the disability affects the capacity to dress, including activities such as bending, reaching and twisting, and any pain associated with those processes. They will also need to consider the effect that regulation 4(2A) might have in relation to the ability to dress or undress to an acceptable standard and within a reasonable time.

**Closing remarks for the appellant**

26. My setting aside of the decision of the Dungannon tribunal will mean the end - perhaps temporarily - to the mobility component currently in payment; what has been paid will not be clawed back as the award was valid until the issue of this decision.
27. Any errors the previous tribunal made should not matter now, because the new tribunal will look at the evidence afresh, and make its own findings on the appellant's likely difficulties and capability in relation to the activities under consideration. Those findings will be based upon its analysis of what it reads and hears.
28. As always, I stress that success before me on a point of law is not an indication of what the result will be at the fresh tribunal, which is examining the facts.

A handwritten signature in black ink, appearing to read 'P. Gray', written in a cursive style.

(Signed): P GRAY

DEPUTY COMMISSIONER (NI)

26 September 2024