

**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 13 January 2020

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. The decision of the appeal tribunal dated 13 January 2020 is in error of law. The error of law will be explained in more detail below.

Accordingly, I set aside the decision of the appeal tribunal.

2. Under Article 15(8)(a)(i) of the Social Security (Northern Ireland) Order 1998, I make the decision that the tribunal should have made on the evidence before it, without making further findings of fact.
3. I find that the Department does not establish that the applicant failed to attend a consultation in person without good reason and that it was not required to make a negative determination under regulation 9 of the Social Security (Personal Independence Payment) Regulations (NI) 2016. I allow the applicant's appeal from the Department's decision of 7 December 2018.
4. In his written observations, Mr Killeen (on behalf of the Department) has noted that the appellant made a further application for Personal Independence Payment (PIP) on 5 October 2020. I have no detail of the outcome of this further claim. It is the case, therefore, that the applicant's PIP claim of 28 March 2018 remains outstanding to the periodical extent of the first decision on any claim after 28 March 2018.

## Background

5. In the submission was produced for the oral hearing of the appeal, the Department has set out the following background to the decision under appeal:

'(The appellant) is a 57 year old who claimed Personal Independence Payment from 28-Mar-2018. A valid claim for Personal Independence Payment was accepted in writing on 28- Mar-2018.

In the clerical claim form PIP1 (Tab 3) dated 22-Mar-2018 (the appellant) was asked if he wished any medical evidence held by the Department, in relation to his current award of DLA, to be made available to the Healthcare Professional and the Case Manager as part of the PIP assessment process.

(the appellant) advised that he wanted to view the evidence before deciding if he wanted it made available for the PIP claim.

A "How your Disability affects you" PIP2 form was received on 21-May-2018. On his claim form (the appellant) stated he has back pain, damaged right ulna nerve, arthritis, Meniere's disease, asthma/COPD, sciatica, sleep apnoea, hypoglycaemia, cramps and cartilage ruptures in both knees.

Additional PIP2 information and a Patient Printout were both received in the Department on 21-May-2018.

A GP factual report dated 14-Jun-2018 was received in the Department on 19-Jun-2018.

(The appellant) was invited to attend a face to face assessment on 02-Jul-2018 however (the appellant) cancelled the appointment and requested a home assessment.

A PA1 with a Capita Communication Logs Report was received in the Department on 09- Jul-2018 which confirms that (the appellant) was issued with an appointment letter on 14-Jun-18 and a reminder letter on 3-Jun-2018. Specimen letters are also included.

On 03-Aug-2019 a PIP.6000 letter was issued to (the appellant) requesting reasons for his failure to attend the assessment on 02-Jul-2018. (The appellant) was advised

on the PIP.6000 that failure to respond would result in a negative determination.

A letter from (the appellant) and response to the-PIP.6000 letter were received in the Department on 09-Aug-2019 and stated that (the appellant) was too ill to travel and that travelling would exacerbate his medical conditions.

On 20-Aug-2018 a PIP.0110 letter was issued to (the appellant).

A letter from (the appellant) dated 23-Aug-2018 was received in the Department on 29-Aug-2018 along with a letter from (the appellant's) GP.

On 10-Sep-2018 the Case Manager accepted good reason and (the appellant) was referred for an assessment.

A letter from (the appellant) dated 20-Sep-2028 was received in the Department on 04-Oct-2018. A hospital appointment letter was also received.

On 04-Oct-2018 a face to face assessment was due to take place in (the appellant's) surgery but (the appellant) failed to attend.

Three PA1 Review Filenotes and a Capita Communication Log were received in the Department on 10-Oct-2018.

A Hospital factual report dated 08-Oct-2018 was received in the Department on 10-Oct-2018.

On 17-Oct-2018 the Case Manager accepted good reason and (the appellant) was referred for a further assessment.

On 08-Nov-2018 a face to face assessment was due to take place in an assessment centre but (the appellant) cancelled the appointment.

On 23-Nov-2018 a face to face assessment was due to take place in an assessment centre but (the appellant) failed to attend.

Two PA1 Review Filenotes and a Capita Communication Log were received in the Department on 30-Nov-2018.

On 07-Dec-2018 the Case Manager decided that (the appellant) is not entitled to Personal Independence Payment from and including 28-Mar-2018 as he did not attend the assessment on 23-Nov-2018 and failed to

provide good reason. (The appellant) was notified of this decision on 07-Dec-2018.

On 17-Dec-2018 (the appellant) requested a reconsideration of the decision dated 07-Dec-2018.

A letter from (the appellant) dated 14-Feb-2019 was received in the Department on 9-Feb-2019.

The decision of 07-Dec-2018 was reconsidered on 21-Feb-2019 but not revised as good reason was not accepted. (The appellant) was notified on 21-Feb-2019.

(The appellant) made an appeal on the approved form and it was received on 11-Mar-2019. A copy of the Capita appointment letter dated 25-Sep-2018 was also included.'

### **The appeal tribunal hearing**

6. The appeal tribunal hearing took place on 13 January 2020 and proceeded by way of a 'paper' hearing. The appellant had completed Form Reg(i)d on 16 April 2019 by ticking a box to indicate that he was content for the appeal to proceed by way of a paper hearing. The completed form was received in the Appeals Service (TAS) on 24 April 2019.

7. The appeal tribunal disallowed the appeal and issued a decision notice in the following terms:

'Appeal refused.

The Appellant has not shown good cause for failing to participate in assessment requested by the Department. The Department decision of 7 December 2018 is upheld.'

### **The initial application for leave to appeal to the Social Security Commissioner**

8. On 5 October 2020 an application for leave to appeal to the Social Security Commissioner was received in TAS. On 22 October 2020 the application for leave to appeal was refused by the Legally Qualified Panel member.

### **Proceedings before the Social Security Commissioners**

9. On 9 December 2020 a further application for leave to appeal was received in the office the Social Security Commissioners.

10. On 15 December 2020 observations on the application for leave to appeal were requested from Decision Making services (DMS). In written observations dated 13 January 2021, Mr Killeen, for DMS, supported the application on one of the grounds submitted by the appellant and on

another identified ground. The written observations were shared with the appellant and his appointee on 14 January 2021.

11. On 18 August 2021 I granted leave to appeal. On the same date I determined that an oral hearing of the appeal would not be required.
12. There then followed a delay in the promulgation of this decision due to the volume of cases in the Office of the Social Security Commissioners. Apologies are extended to the appellant, his appointee, and Mr Killeen.

### **Errors of law**

13. A decision of an appeal tribunal may only be set aside by a Social Security Commissioner on the basis that it is in error of law. What is an error of law?
14. In *R(I) 2/06 and CSDLA/500/2007*, Tribunals of Commissioners in Great Britain have referred to the judgment of the Court of Appeal for England and Wales in *R(Iran) v Secretary of State for the Home Department* ([2005] EWCA Civ 982), outlining examples of commonly encountered errors of law in terms that can apply equally to appellate legal tribunals. As set out at paragraph 30 of *R(I) 2/06* these are:

- “(i) making perverse or irrational findings on a matter or matters that were material to the outcome (‘material matters’);
- (ii) failing to give reasons or any adequate reasons for findings on material matters;
- (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) giving weight to immaterial matters;
- (v) making a material misdirection of law on any material matter;
- (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of proceedings; ...

Each of these grounds for detecting any error of law contains the word ‘material’ (or ‘immaterial’). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.”

### **Relevant legislative provisions**

15. Regulations 9 and 10 of the Personal Independence Payment Regulations (Northern Ireland) 2016, as amended, provide:

**‘Claimant may be called for a consultation to determine whether the claimant has limited or severely limited ability to carry out activities**

9.— (1) Where it falls to be determined whether C has limited ability or severely limited ability to carry out daily living activities or mobility activities, C may be required to do either or both of the following—

(a) attend for and participate in a consultation in person;

(b) participate in a consultation by telephone or by video.

(2) Subject to paragraph (3), where C fails without good reason to attend for or participate in a consultation referred to in paragraph (1), a negative determination must be made.

(3) Paragraph (2) does not apply unless—

(a) written notice of the date, time and, where applicable, place for the consultation is sent to C at least 7 days in advance; or

(b) C agrees, whether in writing or otherwise, to accept a shorter period of notice of those matters.

(4) In paragraph (3), reference to written notice includes notice sent by electronic communication where C has agreed to accept correspondence in that way and “electronic communication” has the meaning given in section 4(1) of the Electronic Communications Act (Northern Ireland) 2001(a).

(5) In this regulation, a reference to consultation is to a consultation with a person approved by the Department.

**Matters to be taken into account in determining good reason in relation to regulations 8 and 9**

10. The matters to be taken into account in determining whether C has good reason under regulation 8(3) or 9(2) include—

(a) C’s state of health at the relevant time; and

(b) the nature of any disability that C has.’

**The decision of Commissioner Stockman in *RS v Department of Communities (PIP)* ([2021] NICom 4 ('RS'))**

16.. In *RS*, Commissioner Stockman said the following at paragraphs 26 to 35:

*Procedural requirements arising from regulation 9*

This is the first case that I have seen involving regulation 9 of the PIP Regulations. What I have seen gives me some cause for concern about the Department's approach to the presentation of such cases to tribunals. However, I cannot tell if the failings in approach that I identify relate to this case alone or reflect more general practice.

Regulation 9 places a requirement on the Department to disallow a claim for PIP where a claimant fails to attend a consultation without good reason. Such regulations have a long history in social security law. Due, no doubt, to the punitive consequences for claimants of failing to attend an examination without good reason, the adjudicating authorities have strictly applied the related procedural requirements that are placed on the Department. Thus, the Great Britain Social Security Commissioner in *R(S)1/64* required adherence to the time limits and necessary content of a notice of examination issued under regulation 10(b) of the National Insurance (Unemployment and Sickness Benefit) Regulations 1948. This approach was carried forward by the Great Britain Commissioner in *R(S)1/87*, applying it to regulation 17(1)(b) of the Social Security (Unemployment, Sickness and Invalidity Benefit) Regulations 1983. The same approach can be seen in the Great Britain Commissioner's decision in *CIB/2221/2005* in relation to decisions under regulation 8 of the Social Security (Incapacity for Work) Regulations 1995 and in my own decision of *TG-v-Department for Communities* [2017] NI Com 68 in relation to a DLA decision under Article 19 of the Social Security Order (NI) 1998.

It is unsurprising that the principles followed consistently within the social security regimes established under the 1948, 1975 and 1992 legislation have been carried forward into the modern era. PIP was introduced somewhat earlier in Great Britain than in Northern Ireland. The Great Britain Upper Tribunal judges have already built up a body of case law addressed to regulation 9 in the Great Britain equivalent of the PIP Regulations. The following principles can be observed:

- *SY v SSWP* [2017] UKUT 363: the tribunal must make a decision on evidence, rather than on the generalised assertions of a history of non-compliance made by the [Department];
- *MB v SSWP* [2018] UKUT 213: a copy of the relevant appointment letter or of a standard form must be placed before the tribunal by the [Department];

- *IR v SSWP* [2019] UKUT 374: the letter inviting the claimant to an examination must use the language of clear and unambiguous mandatory requirement;
- *PPE v SSWP* [2020] UKUT 59: (an ESA decision on parallel provisions to the effect that) the tribunal file must contain a copy of the letter sent or a standard form and evidence that a letter in that form had been generated by the computer system and dispatched.

I find myself in agreement with the decisions of the Upper Tribunal judges in the cases above, which are built on long-standing principles of social security law. I endorse the general principles followed in those cases.

Deconstructing regulation 9 and the requirements of case law, it appears to me that certain matters are required to be proved by the Department to the satisfaction of a tribunal before it can determine an appeal such as the present one under regulation 9. These include establishing the fact of sending the claimant written notice of the date, time and place of the consultation (or notice by electronic communication that the claimant had agreed to accept); establishing that it was sent at least 7 days in advance (or if shorter that the claimant consented to this); and establishing that the notice included clear and unambiguous language informing that claimant that attendance was mandatory and that non-attendance would result in disallowance.

Observing that the decision under appeal was made by the Department on the basis that “you didn’t go to the assessment on 13 February 2018 and we don’t think you’ve given us a good reason for this”, I directed Ms Patterson to indicate what evidence before the tribunal on 9 October 2018 established the following matters:

- (i) that the applicant had been sent a written notice of the appointment of 13 February 2018 stating the place, date and time of the appointment;
- (ii) on what date that written notice of the appointment had been sent;
- (iii) what form the written notice of the appointment of 13 February 2018 took;
- (iv) whether the language of the written notice indicated that attendance at the appointment of 13 February 2018 was a requirement.

I further asked her if the decisions of the Upper Tribunal in *SY v SSWP* [2017] UKUT 363, *MB v SSWP* [2018] UKUT 213 and *IR v SSWP* [2019] UKUT 374 were generally considered to be good law by the Department, or whether these decisions were contested in Northern Ireland.

In response, Ms Patterson indicated that the Department considered that the three decisions were good law. She observed that no evidence establishing the matters at (i) to (iv) above had been before the tribunal. She indicated



that she had now obtained a copy of the written notice of the appointment that was arranged for 13 February 2018 and enclosed it. It includes the place, date and time of the appointment and was issued by Capita on 29 January 2018. The written notice includes the following wording:

*'To complete the assessment process, we will need to meet you face-to-face.'*

and:

***'It is important that you go to this appointment. If you fail to go without a good reason, the case manager at the Department for Communities is likely to refuse your claim.'***

Ms Patterson indicated that it was now her submission that the tribunal erred in law. She accepted that it had failed to satisfy itself of the content of the appointment letter, what the applicant was told, that he fully understood that it was a requirement to attend and the consequences of failure to attend the appointment. She indicated that, in order to comply with the Upper Tribunal judgments, Capita was currently in the process of amending the wording of its appointment letters.

I accept Ms Patterson's concession that the Department's submission to the tribunal did not contain any original or specimen copy of a letter requiring the applicant to attend a medical examination. I observe that the wording of the letter now produced does not comply with the requirements of *IR v SSWP*. The submission prepared by the Department was defective for that reason. I grant leave to appeal on that basis. Unfortunately, however, the Department's submission also appears to have confused the tribunal as to what was the proper subject matter of the appeal, and what evidence it needed to consider.'

I have no hesitation in accepting Commissioner Stockman's careful and authoritative analysis in *RS*.

### **The application of the principles in *RS* to the instant case**

17. In his written observations on the application for leave to appeal, Mr Killeen undertook a detailed analysis of the decision of the Upper Tribunal in *IR*. He noted that the '... Department did not provide a copy of the letter scheduling an assessment for 23 November 2018, nor did it include previous copies.' He concluded that applying the principles set out in *IR* to the fact of non-provision of the letters scheduling assessments in the instant case, the decision of the appeal tribunal was in error of law. I agree with this assessment.

### **The appellant's other grounds of appeal**

18. Having found, for the reasons set out above, that the decision of the appeal tribunal was in error of law, I do not have to consider the appellant's other grounds of appeal.

### **Disposal**

19. I replicate the disposal adopted by Commissioner Stockman in *RS*.
20. Accordingly, I set aside the decision of the appeal tribunal.
21. Under Article 15(8)(a)(i) of the Social Security (Northern Ireland) Order 1998, I make the decision that the tribunal should have made on the evidence before it, without making further findings of fact.
22. I find that the Department does not establish that the applicant failed to attend a consultation in person without good reason and that it was not required to make a negative determination under regulation 9 of the Social Security (Personal Independence Payment) Regulations (NI) 2016. I allow the applicant's appeal from the Department's decision of 7 December 2018.
23. In his written observations, Mr Killeen has noted that the appellant made a further application for PIP on 5 October 2020. I have no detail of the outcome of this further claim. It is the case, therefore, that the applicant's PIP claim of 28 March 2018 remains outstanding to the periodical extent of the first decision on any claim after 28 March 2018.

(signed): K Mullan

Chief Commissioner

24 January 2024