

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 10 October 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

I grant leave to appeal, and deal with the substantive appeal, which I allow. I set aside the decision of the Tribunal sitting at Newtownards on 10 October 2023 as being in error of law. I remit the matter back to a freshly constituted Tribunal with the following directions.

Directions

1. These directions may be supplemented by a Chair of the Appeals Service (TAS) giving listing and case management directions.
2. The hearing shall be before a fresh tribunal. The appellant, or her representative must notify TAS within 21 days of issue of this decision of her choice of telephone, online (video platform) or face to face hearing format.
3. The new tribunal will look at the decision under appeal afresh, and will make its own findings and decision on all relevant descriptors.
4. The appellant should be aware that the new tribunal will be looking at her health problems and how they affected her day-to-day life at the time that the decision under appeal was made on 9 October 2021. Health problems and other difficulties occurring after that can only be taken into account in so far as they shed light on what the position was likely to have been at that time.

REASONS

Preliminary Matters

1. The application for leave to appeal was supported by the Department for Communities (the Department). I have granted it. It is for this reason that I use the term appellant, rather than applicant, throughout.

Background

The relevant legislation

2. The appeal below concerned entitlement to Personal Independence Payment (PIP) under the Personal Independence Allowance Regulations (Northern Ireland) 2016 (the PIP Regulations). Entitlement is demonstrated by scoring points under a series of activities set out in the schedule. Nothing turns on that at this stage, and I need say no more about the PIP legislation.

The PIP Claim

3. On 20 April 2021 the appellant made her claim for PIP, on the basis of anxiety, depression, bladder issues and breathlessness. She had not previously claimed such a benefit. She had a telephone consultation with a disability assessor on 17 September. A decision maker, relying on the report from that assessment, determined the claim on 9 October, awarding no points under either the daily living or mobility activities.
4. There was no change to that decision on a Mandatory Reconsideration. Accordingly, an appeal was lodged with TAS.
5. The Tribunal heard an appeal against that decision. It was considering afresh whether an award of PIP should be made at any level.

The Tribunal hearing

6. The appellant had requested an oral hearing. The Legally Qualified Member sat with a Medical Member (a doctor) and a Disability Member at the Newtownards venue on 10 October 2023. The appellant was represented by Ms Roberts of Community Advice for Ards and North Down, who had made a written submission and attended with her, together with the appellant's sister.
7. The appellant answered questions from the tribunal, and her oral account was considered together with the paper evidence which included the claim form, the Department's Submission and the appellant's General Practitioner notes. The tribunal refused the appeal, awarding 4 points (2 points each for 5b and 7b) under the daily living activities but no points under the mobility activities; this was insufficient for an award of either component.

8. The appellant requested a statement of reasons, and this was provided on 14 February 2024. An application for leave followed on 28 February, which was refused by the Chair on 13 March 2024. The appellant applied to the Commissioners following the refusal of leave below. It is that application that I now consider.

Proceedings before me

9. I have been considerably assisted by the written submissions from the appellant's representative Ms Roberts who acts once again in front of me, and from Mr Clements who acts for the Department.
10. Neither party has requested an oral hearing and I am able to decide the matter fairly on the papers before me.

The arguments of the parties

The appellant

11. The appellant asserts that the Tribunal erred in its consideration of activity 9, engaging with other people face to face by using an approach to the concept behind that activity that was overly restricting: engaging with others, Ms Roberts argues, is more than merely encountering others whilst out, and dealing appropriately with the transactional exchanges that arise.

The respondent

12. The Department supports the application for leave, and indeed the appeal itself, submitting that the case should be remitted to a fresh Tribunal.
13. Mr Clements deals in his submission both with the issue raised by Ms Roberts and, in the spirit of the co-operative process for the proper and correct administration of the benefits system outlined in *Kerr v Department for Social Development (Northern Ireland)* 2004 UKHL 23, he mentions other ways in which the tribunal may have fallen into error of law.

The error of law

14. I agree with Ms Roberts that in its considerations under activity 9 the tribunal adopted an approach to the concept of engaging socially that seemed to ignore stated aspects of the definitions in Part 1 of the schedule in which "engage socially" means -
 - (a) interact with others in a contextually and socially appropriate manner;
 - (b) understand body language; and
 - (c) establish relationships.

15. These aspects must be imported from the schedule into the activity. A number of cases have explained this and expanded on the meanings. Ms Roberts cites one of my own decisions while sitting in the UK Upper Tribunal, *PM v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 0154 (AAC) (from now referred to as PM). I agree with Mr Clements that the issue about taking into account only such engagement as the tribunal finds to be reasonably necessary does not feature here in its reasons; nonetheless, there would appear to be a great deal drawn from the fact that the appellant went alone to shopping centres, where she would inevitably have encountered, and, at some level, had to deal with others. To assume that this level of engagement is sufficient to engage the zero-scoring descriptor, “can engage with other people unaided” is to misunderstand the nature of the difficulties that the other descriptors are aimed at identifying.
16. I observe that PM was one of the Upper Tribunal cases said by the Chief Commissioner in his decision *AH v Department for Communities (PIP)* [2019] NICom 20, paragraph 18, to reflect the law on the issue in Northern Ireland.
17. Like Mr Clements, however, I cite Upper Tribunal Judge Jacobs’ remarks in *RC v Secretary of State for Work and Pensions (PIP)* [2017] UKUT 352 (AAC) at paragraph 13, which seems to me to be entirely on point here:

“I do not accept that establishing a relationship means no more than ‘the ability to reciprocate exchanges’. There is more to it than that. A brief conversation with a stranger about the weather while waiting for a bus does not involve establishing a relationship in the normal sense of the word. Nor does buying a burger or an ice cream, although both involve reciprocating exchanges.”
18. Whilst Mr Clements observes that on the evidence before the tribunal neither descriptors 9c or 9d appeared to be applicable, I mention really for completeness the Supreme Court case of *Secretary of State for Work and Pensions v MM* [2019] UKSC 34, which looks at the difference between descriptors 9b and 9c, which the tribunal may find of assistance.

Other matters

19. I note at this point the helpful remarks of Mr Clements as to the question of materiality: were the matter to conclude on the basis that there may be entitlement to 9b, but no further points, the tribunal decision might not have been said to be in material error of law, as the addition of two points would not lead to an award.
20. He mentions, however, additional areas in which the tribunal might have fallen into error, and I agree with him.

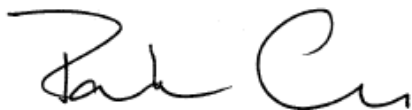
21. The evidence as to the appellant's abilities to wash and bathe covered both physical issues and motivation, and this dual aspect was not considered by the tribunal; neither were the comparator activities they cited sufficiently akin to those that are likely to be engaged in using an unadapted bath.
22. The observation that the appellant did not dispute certain tasks that the Healthcare Professional had said she could accomplish is also one that should be avoided unless the matter has been specifically agreed. A tribunal will not have the time to ask about everything, but it should not make important forensic deductions without checking about such an issue.
23. Accordingly, there were other aspects of the decision that were tainted by misstatements, or a failure to investigate, and they cumulate in a material error of law for which the proper result is a rehearing.

General Points for the assistance of the new tribunal

24. As well as the extremely helpful submissions from Ms Roberts and Mr Clements that I have had the benefit of considering, and which I hope will be before the tribunal, an approach of persuasive authority is set out by Upper Tribunal Judge Hemingway in *TR-v-SSWP (PIP) [2015] UKUT 0626 (AAC)* that if a claimant is unable to perform an activity for part of a day, that day counts towards that period provided that the inability to perform it affects them on that day to more than a trivial extent: in particular see [32-34].

In conclusion

25. The fresh Tribunal will consider the evidence available to it, bearing in mind the points that I make above, and make findings on the disputed issues. The appellant or her representative may re-make any points that I have not needed to consider here, at the rehearing.
26. She must understand that the fact that the appeal has succeeded at this stage on an issue of law is not to be taken as any indication as to what the tribunal might decide as to the facts in due course.



(Signed): P GRAY

DEPUTY COMMISSIONER (NI)

26 September 2024