

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Application by the above-named claimant for leave to appeal to a Social Security Commissioner on a question of law from a tribunal's decision dated 1 February 2024

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I grant leave to appeal, and deal with the substantive appeal, which I allow. I confirm the existing award of the mobility component of personal independence payment (PIP), but set aside the decision as to the daily living appointment of the tribunal sitting at Belfast (but remotely) on 1 February 2024 as being in error of law. I substitute a decision of an award of the daily living component from 18 May 2022 for a period of three years until 17 May 2025 to coincide with the mobility award made by the tribunal.

REASONS

Preliminary Matters

2. I made an initial determination granting leave and directing further submissions in this matter on a particular issue that I thought important, but which had not been raised in the application before me. The submissions are now to hand, and, while the parties are not agreed, neither asks me to hold an oral hearing. I now decide the appeal upon the papers.

Background

The relevant legislation

3. The appeal below concerned entitlement to 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. I refer to the specifics of that as the decision requires.

The PIP Claim

4. On 18 May 2022 the appellant made her claim for PIP. On 21 June 2022 she completed a questionnaire, citing multiple medical problems, including anxiety, depression, agoraphobia, plantar fasciitis, an arthritic hip, a pre-diabetic condition (diagnosed as type 2 diabetes in the period between the claim being lodged and decided), obesity, high blood pressure, acid reflux, irritable bowel syndrome and incontinence. She had a telephone consultation with a disability assessor, and the departmental decision maker (DM) relied upon the report of the assessor in determining the claim on 13 September 2022.
5. Agreeing with the assessment, the DM awarded no points under either the daily living or mobility activities.
6. There was no change to that decision on a Mandatory Reconsideration. Accordingly, an appeal was lodged with the Appeals Service (TAS).

The Tribunal hearing

7. The appellant had requested an oral hearing. The Legally Qualified Member sat with a Medical Member (a doctor) and a Disability Member at the Belfast venue on 1 February 2024. The appellant was represented by Mr Graham Higgin of Advice Space, who had also made a written submission.
8. The hearing appears to have been held remotely so far as the appellant was concerned, as there is reference to the use of a telephone, but the process of taking evidence is clearly set out in the record of proceedings kept by the tribunal Chair.
9. 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 (GP) notes. The tribunal allowed the appeal in part, awarding the mobility component at the standard rate with 8 points under descriptor 12c but refusing the daily living component with a score of 6 points (2 points each for 4b, 5b and 6b) which was less than the 8 points needed for the minimum award.
10. The appellant requested a statement of reasons, and this was provided on 12 April 2024. An application for leave followed, which was refused by the Chair as being out of time. The appellant applied to the Commissioner for leave, following that refusal. The Chief Commissioner admitted the application, finding that it had been received below one day late, which was probably caused by a postal delay, thus special reasons were established, and the matter is before me.

Proceedings before me

11. I have been considerably assisted by the written submissions from the appellant's representative Mr Higgin, who acts once again in front of me, and those from Mr Clements who acts for the Department. I am particularly grateful to them for responding so quickly to my recent directions, enabling this case, which has been ongoing for a long time, to be more speedily concluded.

The arguments of the parties

The appellant

12. Mr Higgin argues that the tribunal erred in its approach to Activity 1, preparing food. He references comments in the GP notes relating to the appellant's right wrist, in support of her struggle with tasks, and alludes that to her evidence about being unreliable in the kitchen, with a tendency to drop pots and pans. He suggests that the tribunal should have enquired about her ability to cut up food in light of that.
13. He submits that the finding as to her underplaying her duties at work was irrational, and/or required an evidence base that was not set out, describing the tribunal's apparent justification as 'hopelessly obscure'.
14. He prays in aid the illegibility of a report from an occupational health assessment of the appellant, but which, because of its lack of clarity, he argues should not have been relied on by the tribunal.
15. On the matter I raised in my directions, Activity 9, he relies on the decision of Upper Tribunal Judge Fitzpatrick in *KW v Secretary of State for Work and Pensions (PIP)* 2024 UKUT 410 (AAC) (from now on KW) in which she discusses findings based upon the nature of the appellant's employment, and emphasises the need for a holistic approach to the application of the descriptors, that is, one which is based on more than interactions within one specific context.

The respondent

16. The Department does not support the appellant's position on the basis that the statement of reasons deals adequately with the various issues.
17. Mr Clements argues that the way in which the case was put on behalf of the appellant justified the tribunal not pursuing the line of enquiry Mr Higgin now suggests, as to her wrist. He analyses the medical evidence about a possible wrist injury, noting it to be some considerable time prior to the relevant qualifying periods.

18. He helpfully sets out case law on the level to which a tribunal needs to justify (by reference to specific evidence) its conclusions about credibility, or indeed its own expertise in a particular matter.
19. As to Activity 9, he points out that the case law, and specifically the decision in KW, does not prevent a tribunal from relying on engagement while at work, and that here there was sufficient explanation by reference to other factors, such as a lack of credibility in relation to her description of her duties and abilities in the work context, that support the conclusion of the tribunal that no points were merited under that Activity.

Discussion and analysis

20. Despite being absorbed by the initial compelling arguments of both representatives, because I am deciding the case on the Activity 9 point alone, I need say only a little about them.
21. Whilst a tribunal has an inquisitorial role, Mr Higgins must accept that he could have brought out further information as to the reasons behind the appellant's comments about dropping of pots and pans, and the record of proceedings shows that he had the opportunity to adjourn for a potentially better copied Occupational Health report, or to make plain his view that no reliance should be placed upon it. In any event, it seems to me that the part played by the report was slight, and any error in that regard not material.
22. As to the extent of the inquisitorial duty on the tribunal, the legal position is the dicta of Commissioner Brown set out in *C5/03-04 (IB)* as approved by the Court of Appeal in *Mongan v Department for Social Development* [2005] NICA 16, which says that it does not have a limitless inquisitorial role; within its duty to enquire the question whether an issue is sufficiently apparent from the evidence to give rise to such a duty will depend on the circumstances of the case.
23. Here there is no need for me to form a view as to whether these circumstances gave rise to a culpable lack of curiosity on the part of the tribunal about the potential danger of falling kitchen equipment, or, if that occurred, its effect on the standard of a meal prepared in such a manner.
24. As to the credibility point, this really merges with that of the tribunal praying in aid knowledge about the likely tasks the appellant would have performed in her work, the sources of which it did not explain.
25. There is no need for a tribunal to explain in detail why it does not believe a witness; that said, accepting parts of a person's account and rejecting others may give rise to a need to elucidate. Similarly with evidence relied upon in one context but not in another.
26. Here, in dealing with the point-scoring descriptors the reasons set out the supportive medical evidence which led to the tribunal concluding that the

appellant's claim of difficulties was probable. In relation to the activities where points were not awarded, I agree with Mr Clements that the tribunal did not need to go into the source of the experience that led to its view. There was, however, an inconsistency in its use of the medical evidence that I deal with below. This is, in my judgment, of sufficient materiality to amount to an error of law because of the two-point discrepancy between an award and no award.

The error of law

27. I am of the view that the Tribunal erred in its consideration of activity 9, engaging with other people face to face.
28. This had been an issue in the appeal; it was put forward in evidence (which I paraphrase) that the appellant tried to minimise her engagement with work colleagues although she could engage with them when required, but that socially she had problems relating to others, and had done for much of her life.
29. I draw attention to 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.
30. I note Mr Clements' submissions on the issue, but I am not persuaded that the tribunal in fact performed the holistic assessment required in an Activity 9 assessment which is spelt out clearly in KW. The focus was on the appellant's abilities at work, and while I accept that the credibility concerns about a particular aspect might taint other evidence, this was not really the tenor of the reasons for the decision made.
31. In the reasons, support from the medical notes was set out to explain each two-point award. The clear implication was that the treatment or referral by the documenting clinician was relied upon in the points awards. There were, however, medical notes to the effect that the appellant had been both offered medication and referred for therapy upon her mentioning her problems in the Activity 9 sphere, and there was a need to explain why the medical notes were considered sufficient to support points under three Activities, but not a fourth, which would have been critical. It is important that I note the materiality of this: any points award under a fourth Activity would have led to an award at the standard rate of the daily living component.
32. My view is that in both its concentration on behaviour at work, and the failure to explain its approach to apparently supportive medical evidence for the Activity 9 criteria, the tribunal fell into error.

Should I remit or re-decide the appeal?

33. I have power to remake a decision, and if I feel that I am able fairly to make a decision then I should do so. I mention here again the length of time that this matter has endured; there is no fault attached to that, but it strengthens the case for my deciding it if possible.
34. An appeal tribunal hearing PIP appeals comprises a lawyer, a medical member and a member with experience of disability. It is important for me to consider whether any decision that I make will be deficient in some way for the lack of that expertise.
35. The tribunal is the fact-finding body and it is in that aspect that the expertise of the members is so valuable; however, knowing the basis of the points the tribunal decided were applicable on the basis of support within the clinical notes, I believe that I am in a position to apply that principle to the evidence that relates to Activity 9 without the assistance of a specialist medical or disability member.

I find the following facts

36. The appellant has suffered from social anxiety for a number of years.
37. The level of that has been such that she has consulted her GP, and been referred to other health professionals in relation to it.
38. Her clinicians have offered treatment for social anxiety, both tablets, which she refused having had a bad experience with similar tablets before, and therapy.
39. She rejected the therapy on the first occasion as the venue and timing would have been a problem to dovetail with her work.
40. She returned to her GP in some distress over the same problems in June 2022 and was re-referred to a therapeutic centre. This is sufficiently proximate to the Department's decision in September 2022 to shed light on her condition at that time.

The facts above are found for the following reasons

41. The clinical notes from around the date of the Department's decision support the contention that the appellant has suffered extensively from anxiety. I cite a few examples from the notes to demonstrate this.
42. In September 2021 it is noted that the claimant had suffered from 'social anxiety for years'. It mentions a nervousness around others and in work, with 'catastrophic thinking'. I take the latter to be the catastrophising that is frequently associated with an anxiety state.

43. In June 2022 anxiousness, social anxiety, esteem and self-confidence issues are noted. The appellant is described as socially isolating, a 'people pleaser' and as feeling responsible for the mistakes of others. She is said to like her own company, but is aware that she is socially isolated. That is said to be by choice, although she would like to be more sociable. She was re-referred to a Wellbeing Hub. She had not pursued the previous referral because the location and timing were unsuitable and/or incompatible with her working hours.
44. At a different review, but also in June 2022 (at page 106) it is noted that the claimant 'really struggles with anxiety'. She is said to be tearful, and to have been intolerant of her own needs in the past. This may relate to the occasion when she was referred for therapy but did not pursue it, mentioned above. In this note she is said to struggle with work, being outdoors or in large groups, these things impacting her mood. She said she was not keen to take SSRI drugs. There are other earlier notes to the effect that she had suffered with a panic attack response to her prior use of these.
45. Importantly, here it is said that she 'spends a lot of money on pads'. This is a reference to her incontinence problems, and it is the use of incontinence pads that the tribunal accepted as supporting the points score under Activity 5b. That fortifies me in adopting other matters set out in this consultation report in my findings.
46. I look at the tests in relation to Activity 9, engaging with other people face to face. I bear in mind what is said by Judge Fitzpatrick in KW, and I consider the appellant's abilities to engage with others and form social relationships, rather than the more transactional contact that work demands. Her initial making of, and her repetition of that complaint in a clinical context suggest more than mere shyness or social awkwardness, and that two referrals for treatment of the issues she raised were made, makes it yet more likely to be a problem that, subject to a relevant descriptor being applicable, can found a PIP award.
47. The notes I refer to support her contention that she has problems in this activity, and that descriptor 9a is not applicable.
48. There may be an issue as to whether descriptor 9b or 9c applies. On the evidence before me I am confident that 9b is engaged; 9c could be applicable, however, that is less persuasive without further explanation of needs in facilitating engagement. It will not affect the outcome for me to decide the matter without that further detail. My findings do not rule out any later argument before the Department or a tribunal that 9c applies.

Conclusions

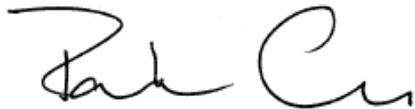
49. The result is to award 2 points, bringing the points score under the daily living activities to 8. A PIP award of the daily living component at the standard rate is made from 18 May 2022 to 17 May 2025.

The length of the award

50. The current mobility award was for three years from 18 May 2022. I asked in my recent directions whether the claimant had been sent the renewal claim information that usually goes out six months prior to an award expiring, so that the claimant can source any information they need to provide to support the continuance of an award at the same or a higher level.
51. I am told that there has been an extension for the filing of a renewal application until 25 January 2025, for the appellant to obtain advice. I am conscious that it is almost that date as I write this, and inevitably the process of issuing the decision will take a minimum of a few days.
52. I have considered extending the daily living award, or both awards; however, I am not convinced that pragmatism in relation to the renewal application should be a driver for a longer award. I feel that reliance can be placed on the Department in dealing with any applications for further time, in these unusual circumstances.
53. I make the daily living award for three years to coincide with the existing mobility award, because unless particular circumstances make it inappropriate for awards to be synchronised, they should run in tandem.

Caution

54. The continuation of an award of either component is not to be relied upon.



(Signed): P GRAY

DEPUTY COMMISSIONER (NI)

5 February 2025