

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 24 February 2020

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from the decision of an appeal tribunal with reference NW/5930/19/03/D.
2. For the reasons I give below, I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(a) of the Social Security (NI) Order 1998.
3. I determine the appeal myself without making further findings of fact. I allow the appeal, with the consequences set out at the conclusion of this decision.

REASONS

Background

4. The appellant, born in April 1952, had been awarded disability living allowance (DLA) by the Department for Social Development from 7 September 1993, most recently at the high rate of the mobility component and the low rate of the care component. Following legislative changes resulting from the Welfare Reform (NI) Order 2015 (the 2015 Order), the Department for Communities (the Department) invited him to claim personal independence payment (PIP) by letter in July 2017. The appellant responded by letter on 27 August, saying that he had moved to live permanently in the Republic of Ireland. He enclosed a copy of his letter dated 29 June 2017 to the Disability and Carers Service notifying

them that he was moving permanently to the Republic of Ireland with effect from 1 July 2017.

5. The Department issued a further letter on 4 September 2017, advising the appellant that his award of DLA had been suspended and that, if he did not claim PIP by 4 October 2017, his DLA award would be terminated. On 7 September 2017 the appellant wrote and stated that he had incorrectly understood that by leaving the UK he was not eligible for PIP. He then submitted a PIP claim form on 29 September 2017.
6. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 4 January 2018. He asked for evidence relating to his previous DLA claim to be considered. The appellant was advised that he would be asked to attend a consultation with a healthcare professional (HCP) based in the Republic of Ireland. After some correspondence aimed at arranging a consultation, in November 2018 the appellant advised the Department that he was once again living in Northern Ireland and requested a consultation in Northern Ireland. The Department submits that the appellant was invited to attend a consultation with a healthcare professional on 19 December 2018, but that he did not attend. The Department submits that it issued a PIP 6000 letter, asking the appellant for his reasons for non-attendance. What appears to be an extract from a PIP6000 dated 24 January 2019 contains a response to the effect that the appellant did not attend as he had been awarded DLA for life and was still alive.
7. On 31 January 2019 the Department decided that the appellant was not entitled to PIP on the basis that he had not attended a medical examination and had not established a good reason for that. This had the secondary consequence that his award of DLA was terminated. The appellant requested a reconsideration of the Department's decision. He was notified that the decision had been reconsidered by the Department but not revised. He appealed. His appeal was out of time, but the Department accepted the late appeal.
8. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member on 24 February 2020. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 18 August 2020. 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 17 December 2020. On 30 December 2020 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

9. The appellant submits that the tribunal has erred in law by:

- (i) failing to take into account s.88 of the 2015 Order and by implication his submission that he remained entitled to DLA;
- (ii) failing to give him a fair hearing;
- (iii) making a perverse finding of fact;
- (iv) deciding the wrong appeal;
- (v) failing to address his submissions on the legislation extinguishing DLA entitlement and by giving inadequate reasons for its decision.

10. The Department was invited to make observations on the appellant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted that the tribunal had not erred in law on any of the grounds identified by the appellant.
11. However, Mr Killeen indicated that the Department supported the application on a different ground, namely that the tribunal had not established that the letter inviting the appellant to the PIP medical examination had used the language of clear and unambiguous mandatory requirement. He cited the decision of Upper Tribunal Judge Wikeley in *IR v Secretary of State for Work and Pensions* [2019] UKUT 374 and my own endorsement of it in *RS v Department for Communities* [2021] NI Com 4. He submitted that the tribunal had consequently erred in law.

The tribunal's decision

12. 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 PIP claim documentation completed by the appellant, previous DLA evidence, various correspondence between the Department and the appellant, and a submission that the appellant was invited to attend a consultation with a HCP on 19 December 2018, which appears to have been scheduled to take place at the appellant's own home. The tribunal had a communication logs report and a specimen copy of the standard letter issued in such cases. The tribunal had what appears to be an extract from a PIP6000 form sent to the appellant asking why he couldn't attend his consultation, copies of decisions and material relating to a complaint made by the appellant. The tribunal also had a copy of a submission made by the appellant attaching various correspondence. The appellant attended the tribunal and gave oral evidence.
13. At the hearing, the appellant did not dispute being notified of the consultation with the HCP but said that he had not attended as he had been awarded DLA for life, and that he therefore considered the PIP

assessment to be superfluous. The tribunal considered the legislative background to DLA and the commencement of PIP. It noted that the appellant had also wished to appeal the termination of his DLA, but that this was not the issue in the present appeal. The tribunal addressed the issue of non-attendance at the consultation and the submission that he remained entitled to DLA. It rejected the appellant's submission finding that this did not amount to a good reason for not attending the consultation. It disallowed the appeal accordingly.

Relevant legislation

14. PIP was established by article 82 of the 2015 Order. 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.
15. 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.
16. In order to assess whether a claimant has limited or severely limited ability to carry out activities, the Department may direct a consultation with a person it approves for that purpose. Regulations 9 and 10 provide for the consultation and the consequences of any failure to attend, as follows:

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.

(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.

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

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

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

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

16. A further relevant provision which must be addressed in this case is article 88 of the 2015 Order. This provides:

88.—(1) A person is not entitled to the daily living component or the mobility component for any period after the person reaches the relevant age.

(2) In paragraph (1) “the relevant age” means—

(a) pensionable age (within the meaning given by the rules in paragraph 1 of Schedule 2 to the Pensions (Northern Ireland) Order 1995); or

(b) if higher, 65.

(3) Paragraph (1) is subject to such exceptions as may be provided by regulations.

The Personal Independence Payment (Transitional Provisions) Regulations (Northern Ireland) 2016 (the Transitional Regulations) provide for the exceptions

referred to above and are therefore directly relevant. In particular, by regulation 2 of the Transitional Regulations:

“DLA entitled person” means a person aged 16 or over who is entitled to either component or both components of disability living allowance;

Regulations 3, 4, 7 and 27 are also relevant as follows:

3.—(1) The Department may by written notification invite a DLA entitled person to make a claim for personal independence payment.

(2) The Department must not send a notification under paragraph (1) to any person who, on 20th June 2016, was 65 or over.

4. A DLA entitled person who has not been sent a notification under regulation 3(1) may make a claim for personal independence payment if the person was aged under 65 on 20th June 2016.

7. A notification to a DLA entitled person under regulation 3(1) inviting the person to claim personal independence payment must—

(a) explain that the person’s entitlement to disability living allowance will end if the person does not claim personal independence payment;

(b) state the date of the last day of the period within which the person should claim personal independence payment, that period being one of 28 days starting with the day that is the stated date of notification;

(c) tell the person how to claim personal independence payment, and may contain such additional guidance and information as the Department considers appropriate.

27.—(1) Article 88(1) of the 2015 Order (persons of pensionable age) does not apply to a person to whom this regulation applies.

(2) This regulation applies to a person who—

(a) had not reached 65 on 20th June 2016;

(b) is a DLA entitled person; and

(c) claims personal independence payment—

(i) in response to a notification sent to the person by the Department under regulation 3(1), or

(ii) under regulation 4...

Submissions

17. The appellant's grounds of appeal were essentially addressed to the legislation governing the transfer of claimants from DLA to PIP under the 2015 Order. He submitted that by article 88 of the 2015 Order a person is not entitled to either component of PIP after reaching 65 years of age. He submits that limited exceptions provided for in the Transitional Regulations do not apply to him. In particular, while acknowledging that regulation 3 permitted the Department to invite claims from persons who were under 65 on 20 June 2016, he observed that he reached the age of 65 in April 2017. He submits that the Department did not make any attempt to contact him until he was already 65. He submits that he could not satisfy the conditions of entitlement at that date due to his age. Consequently, he submitted that the power to invite claims was restricted by implication to persons who were aged 64 on 20 June 2016 but had not yet reached the age of 65. He submitted that the invitation to claim PIP, the follow-up invitation in September 2017 and the invitations to attend a medical examination were beyond the Department's powers, *ultra vires* and unlawful.
18. He submitted that the tribunal failed to engage with his submissions and did not afford him a fair hearing. He emphasised that his appeal was not simply about non-attendance at the medical examination but also involved the broader questions above, and in turn whether his DLA award was lawfully terminated. He submitted that he had been awarded DLA in 1993 and later 1995, and that under section 71(3) of the Social Security Contributions and Benefits Act (NI) 1992 provided for awards "for a fixed period or for life". In that context, he acknowledged that an amendment to section 71(3) by article 64(1) of the Welfare Reform and Pensions (NI) Order 1999 changed that to "for a fixed period or for an indefinite period". Nevertheless, he submitted that the change was not expressly retrospective. He submitted that existing awards made prior to 12 January 2000 were not affected. In particular, the Department did not issue any

fresh decisions superseding the existing “life” awards. He submitted that the legislation introducing PIP similarly did not address this issue. More generally, he submitted that nothing in the legislation made it compulsory for a claimant to transfer from DLA to PIP other than following a change of circumstances. He further observed that, whereas he sought reconsideration of the decision terminating his DLA award, he was never given a reconsideration decision.

19. Mr Killeen had responded with observations on behalf of the Department. He noted that article 88(1) prevented persons over 65 from entitlement to PIP. However, he submitted that article 88(3) of the Welfare Reform (NI) Order 2015 established exceptions to the general rule. He submitted that regulation 3 of the 2016 Regulations permitted the Department to send invitations to claim PIP to persons who were entitled to DLA and who were under 65 on 20 June 2016. He submitted that regulation 27 prevented the age rules in article 88(1) from applying to claimants who were under 65 on 20 June 2016, were entitled to DLA and claimed PIP in response to a notification sent under regulation 3(1).
20. He generally submitted that the tribunal erred in law, however. This was on the basis that the tribunal had failed to apply case law and correct legal principles applying in the case of failure to attend medical examinations. He referred to *RS v Department for Communities* [2021] NI Com 4. He submitted that the tribunal had consequently erred in law.

Hearing

21. I held an oral hearing of the appeal. The appellant appeared in person. Mr Killeen appeared for the Department. I am grateful to them both for their clear and pragmatic submissions.
22. I had previously granted leave to appeal on grounds including whether the Department had lawful power to issue an invitation to the appellant to claim PIP after 9 April 2017, and in any event on 17 July 2017 and whether, as a matter of law, he remains entitled to DLA at the rate previously enjoyed by him.
23. At the outset, the appellant conceded that he could not succeed on the basis of his argument that the Department could not lawfully issue an invitation to claim PIP after age 65. He accepted in particular that article 88(1) of the Welfare Reforms (NI) Order 2015 was qualified by regulation 27 of the Transitional Regulations.
24. He made submissions on the issue of life awards of DLA. He submitted that the decision to terminate his DLA award was unlawful on the grounds that he had a life award from 1995, and the legislation that removed life awards was not expressly retrospective. He further submitted that the decision to award him DLA under the original form of section 71(3) of the 1992 Act gave rise to a legitimate expectation that it was in fact for life.

25. Mr Killeen for his part submitted that the government had adopted a policy to replace DLA with PIP for all persons aged between 16 and 65 at the date of commencement of the relevant legislation. It was entitled to change its policy and in consequence of the policy change to change the conditions of entitlement to benefits.

Assessment

26. In the present case, the core issue is whether the tribunal was correct to hold that the appellant did not have good reason for not attending a medical consultation arranged by the Department. However, the Department offers support for the appeal. The basis for this lies in the circumstances in which the appellant was invited to attend a consultation in and around December 2018. Mr Killeen points to *RS v Department for Communities* where I had referred to relevant case law from Great Britain and endorsed the principles arising from it.
27. In the present case there was an assertion by the Department that the appellant had been called to attend a medical examination. However, there was no evidence to confirm this in the papers before the tribunal, no copy of the notice and no indication of whether the language used in such a notice indicated a clear and unambiguous mandatory requirement. As this did not satisfy the requirements of case law, Mr Killeen supported the submission that the tribunal had erred in law. I consider that the submission that the tribunal has erred in law on this basis is clearly correct.
28. The appellant had wished to raise deeper issues with the tribunal that it elected not to engage with. These concerned the age limits for claiming PIP and the lawfulness of terminating his DLA award. The appellant himself accepts that there is no merit in the first of the arguments advanced. I consider that he is correct to do so.
29. The basis of the appellant's submission had lain in article 88(1) of the 2015 Order. Subject to specific exceptions provided for at 88(3), this provides that a person is not entitled to the daily living component or the mobility component of PIP for any period after the person reaches pensionable age or, if higher, 65. The appellant submitted that he could not have been entitled to PIP on or after 9 April 2017, which was the date of his 65th birthday. In short, the invitation to claim PIP should not have been issued after he reached 65.
30. Nevertheless, relevant exceptions apply. These appear at regulations 3 and 27 of the Personal Independence Payment (Transitional Provisions) Regulations (NI) 2016. Under regulation 3(1), the Department may send a notification to a DLA entitled person to invite them to claim PIP so long as they are under 65 before 20 June 2016. This in turn leads to regulation 27(1) and (2) which provides an exception to article 88(1) where the claimant falls under regulation 3(1) or 4. I consider that the appellant was

correct not to pursue this line of argument and I dismiss the appeal on this ground.

31. The appellant maintained further argument in relation to the life award of DLA at the hearing before me. His DLA award had been terminated in consequence of the failure to attend the consultation without good reason under regulation 9(2) of the PIP Regulations. The specific mechanism that permits this arises under regulation 13(1)(a) of the Transitional Regulations. This terminates the claimant's DLA entitlement in the case of a transfer claimant where a negative determination is made in relation to both components of PIP under regulation 9(2) of the PIP Regulations. The term "transfer claimant" includes someone who has been invited to claim PIP under regulation 3(1) of the Transitional Regulations.
32. The appellant in essence submits that the tribunal has erred in law on the basis that, on a correct application of the law, he should properly have remained entitled to the life award of DLA made in 1995. He relies firstly on the doctrine of legitimate expectation. He submits that the letter awarding him DLA for life gave rise to a legitimate expectation that this was in fact the case.
33. In *Bhatt Murphy (a firm), R (on the application of) v The Independent Assessor* [2008] EWCA Civ 755, Laws LJ held at paragraph 32:

32. A substantive legitimate expectation arises where the court allows a claim to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision-maker's ambition to change or abolish it. Thus it is to be distinguished from a merely procedural right. It is expressed by Simon Brown LJ as he then was in *Ex p Baker* as category 1:

"1. Sometimes the phrase [sc. legitimate expectation] is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him... [Various] authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel."

34. In this case the appellant was awarded DLA in September 1995. However, the letter awarding DLA does not use the term life award. It simply

indicates that “from and including 7 September 1995 you can get the lower rate for help with personal care you can get the higher rate for help with getting around”. The letter was a computer generated standard award letter of the type received by all DLA claimants.

35. The appellant would have had to have gone to the legislation itself to locate the term “life award” in section 71(3) of the 1992 Act. Had he also gone to the Social Security Administration (NI) Act 1992 – the sister of the 1992 Act – he would have found section 30(4) which provided that “where a person has been awarded a component for life, on a review ... an adjudication officer shall not consider the question of his entitlement ... unless (a) the person awarded the component expressly applied for the consideration of that question or (b) information is available to the adjudication officer which gives him reasonable grounds for believing that entitlement ... ought not to continue.” This is a long defunct provision, but I refer to it to make the point that a “life award” – while ring-fenced to some extent – was nevertheless still subject to review. I simply do not accept that the notification of the award of the low rate care and high rate mobility components in the appellant’s case could have amounted to a clear and unambiguous representation that he would continue to enjoy them for life regardless of circumstances.
36. The appellant accepted that the relevant legislation had been amended in January 2000 by article 64(1) of the Welfare Reform and Pensions (NI) Order 1999. This substituted the words “for life” in section 71(3) of the 1992 Act with the words “for an indefinite period”. Mr Killeen submitted that this change was made to modify any such expectations as may have been created by the form of the legislation in place from 1992 to 2000 and clarified that there was no entitlement “for life”. The appellant submitted in response that this legislation was not expressly retrospective and could not remove the right that the previous legislation had given.
37. I do not intend to engage with the particular submission on retrospectivity. This is because it is premised on the previous form of the legislation giving rise to a substantive legitimate expectation. However, it appears to me that the correspondence to the appellant notifying him of an award of DLA from and including September 1995, against the legislative background that existed between 1992 and 2000, did not amount to be a clear and unambiguous representation upon which it was reasonable for the appellant to rely. I do not accept that a substantive legitimate expectation reasonably arose from the award of DLA that entitlement would continue for the duration of the appellant’s life. I dismiss the appeal on this ground.
38. However, for the reasons I have given relating to the procedural failures around the notification of the time and date of consultation to the appellant, and failure to establish the terms in which he was invited to the consultation, I allow the appeal. I set aside the decision of the appeal tribunal.

Disposal

39. As the facts of the appeal are not in dispute, I consider that I am in as good a place to determine this appeal myself as a tribunal on remittal. I therefore determine the appeal under Article 15(8)(a) of the Social Security (NI) Order 1998.
40. In the absence of necessary proofs being submitted by the Department, I find that the Department has not established that the appellant failed to attend a consultation without good cause. I allow the appeal against the negative determination under regulation 9(2) that was issued on 31 January 2019. The appellant's claim for PIP dated 12 October 2017 is therefore still subsisting.
41. This has the further consequence that the decision to terminate the appellant's DLA award under regulation 13(1)(a) of the Transitional Regulations is void and of no effect. This is on the basis that the appeal from the negative determination under regulation 9(2) has been allowed and that a negative determination must be established as a precedent fact in a termination decision under regulation 13(1)(a).
42. This matter should now revert to the Department, who may issue a fresh invitation to the appellant to attend a consultation.

(signed): O Stockman

Commissioner

7 July 2021