

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Application by the claimant for leave to appeal
and appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 3 February 2021

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application by way of an appointee for leave to appeal from the decision of an appeal tribunal with reference EK/3731/20/02/D.
2. For the reasons I give below, I grant leave to appeal. I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998 and I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

3. The applicant is a child who had previously been awarded disability living allowance (DLA) from 10 February 2016, most recently at the middle rate of the care component from 6 April 2020. Her award of DLA was scheduled to terminate under the legislative changes resulting from the Welfare Reform (NI) Order 2015, due to reaching the age of 16. Therefore, she claimed personal independence payment (PIP) from the Department for Communities (the Department) from 14 February 2020 on the basis of needs arising from type 1 diabetes, dyslexia and mental health problems. Her mother (the appointee) had been appointed by the Department to act on her behalf on 17 October 2019.
4. A PIP2 questionnaire describing the effects of the applicant's disability was completed by the appointee and returned to the Department on 23 March

2020 along with evidence in the form of blood sugar monitoring graphs, medical evidence and a SEND report. The appointee asked for evidence relating to the previous DLA claim to be considered. A consultation with a healthcare professional (HCP) was conducted at the applicant's home in the presence of the appointee and the Department received a report of the consultation on 22 July 2020. On 11 August 2020 the Department decided that the applicant did not satisfy the conditions of entitlement to PIP from and including 14 February 2020. The applicant requested a reconsideration of the decision, submitting further evidence. The Department obtained supplementary medical advice on 16 September 2020. The applicant was notified that the decision had been reconsidered by the Department but not revised. The appointee appealed. On 18 December 2020, the applicant waived the right to attend an oral hearing of the appeal.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member on 3 February 2021. The tribunal disallowed the appeal. The applicant then requested a statement of reasons for the tribunal's decision and this was issued on 7 May 2021. The applicant 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 28 June 2021. On 2 July 2021 the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The applicant, represented by the appointee, submits that the tribunal has erred in law by failing to apply the law, as it was interpreted by the Great Britain Upper Tribunal in *Secretary of State for Work and Pensions v AN*, with particular reference to diabetic control and the issue of managing therapy or monitoring a health condition. She further makes reference to a recent Public Service Ombudsman report on medical assessments in PIP cases.
7. The Department was invited to make observations on the applicant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen submitted that the tribunal had erred in law. He indicated that the Department supported the application.

The tribunal's decision

8. 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 the PIP2 questionnaire completed by the applicant, further medical evidence, a consultation report from the HCP, correspondence, a paediatric report and supplementary medical advice. The tribunal had a written submission from the appointee with attachments that included charts on blood sugar

management and an image of self-harm scars. As an oral hearing had not been requested, the appeal was decided on the papers.

9. The tribunal accepted that the applicant had type 1 diabetes from childhood. However, it found that she could normally manage this independently, while awarding 1 point for descriptor 3.b(i) for use of a Libre monitor. It noted that she had low average cognitive ability and dyslexia, accepting that this would lead to difficulty with her ability to read and understand signs, awarding 2 points for descriptor 8.b. It noted complaints of back and leg pain, and low mood. However, it did not accept that she was suffering from musculoskeletal problems that brought her within the scoring descriptors. It noted evidence of self-harm and a counselling referral, but did not accept that mental health difficulties would bring the applicant within the scoring descriptors for daily living or mobility.
10. As the tribunal had awarded 3 points only, and as this was below the relevant threshold for entitlement to either component, it disallowed the appeal.

Relevant legislation

11. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. 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.
12. 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.
13. Additionally, by regulation 4, certain other parameters for the assessment of daily living and mobility activities, as follows:
 - 4.—(1) For the purposes of Article 82(2) and Article 83 or, as the case may be, 84 whether C has limited or severely limited ability to carry out daily living or mobility activities, as a result of C's physical or mental condition, is to be determined on the basis of an assessment taking account of relevant medical evidence.
 - (2) C's ability to carry out an activity is to be assessed—
 - (a) on the basis of C's ability whilst wearing or using any aid or appliance which C normally wears or uses; or

(b) as if C were wearing or using any aid or appliance which C could reasonably be expected to wear or use.

(3) Where C's ability to carry out an activity is assessed, C is to be assessed as satisfying a descriptor only if C can do so—

(a) safely;

(b) to an acceptable standard;

(c) repeatedly; and

(d) within a reasonable time period.

(4) Where C has been assessed as having severely limited ability to carry out activities, C is not to be treated as also having limited ability in relation to the same activities.

(5) In this regulation—

“reasonable time period” means no more than twice as long as the maximum period that a person without a physical or mental condition which limits that person's ability to carry out the activity in question would normally take to complete that activity;

“repeatedly” means as often as the activity being assessed is reasonably required to be completed; and

“safely” means in a manner unlikely to cause harm to C or to another person, either during or after completion of the activity.

Assessment

14. An appeal lies to a Commissioner from any decision of an appeal tribunal on the ground that the decision of the tribunal was erroneous in point of law. However, the party who wishes to bring an appeal must first obtain leave to appeal.
15. Leave to appeal is a filter mechanism. It ensures that only applicants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.
16. An error of law might be that the appeal tribunal has misinterpreted the law and wrongly applied the law to the facts of the individual case, or that the appeal tribunal has acted in a way which is procedurally unfair, or that the appeal tribunal has made a decision on all the evidence which no reasonable appeal tribunal could reach.

17. The grounds advanced by the appointee were lengthy, being set out over some 17 handwritten pages. However, in summary, she relied upon the Upper Tribunal decision of *Secretary of State for Work and Pensions v AN* to submit that the tribunal had erred in its interpretation of daily living activity 3. She further took issue with a finding of the tribunal on the prevalence of hypoglycaemic episodes, submitting that it had made a mistake as to a material fact, overlooking evidence in the form of daily graphs of blood sugar levels that had been before it. She took issue with the tribunal's reference to past sporting activity, whereas in the present the applicant had been referred for physiotherapy due to musculoskeletal pain. She further submitted that the tribunal had failed to refer to evidence of the applicant's mental health symptoms. She further relied upon general evidence in the form of a recent report of the Public Service Ombudsman on the PIP assessment process which she had heard discussed on Radio Ulster.
18. In response, Mr Killeen for the Department, while acknowledging the report of the Public Service Ombudsman, disputed that it related to the conduct of the particular tribunal. However, he accepted that the tribunal had made confusing findings around physical activity, referring to past sporting activity when making findings, while appearing to overlook evidence of present back and knee pain. He submitted that the tribunal appeared not to address the issues of use of a shower seat and night time continence that had been raised in the context of hypoglycaemia. Mr Killeen accepted that the tribunal had arguably erred in law in relation to daily living activity 4 (Washing and bathing) and 5 (Managing toilet needs) by failing to address the question of whether she might reasonably need to use a shower seat or wear continence pads at night. I accept the concessions made by the Department and I grant leave to appeal.
19. Whereas the descriptors raised by Mr Killeen had the potential to add only 4 more points to the existing 3, totalling 7, this would be below the scoring threshold and not a material error in the sense of influencing the outcome of the appeal. However, he more generally accepted that the tribunal had placed weight on statements given a year prior to the Department's decision. He submitted that these might not have reflected circumstances accurately at the date of the decision under appeal. Mr Killeen observed possible changed circumstances between some of the past evidence relied upon by the tribunal and the circumstances at the date of the Department's decision. For example, between January 2018 and February 2019 there are references to the applicant being fit and well and currently getting into rowing and doing a lot of exercise. However, by January 2020 there are references to back pain and physiotherapy. A GP letter of September 2020 refers to chronic back pain and the applicant having a BMI of 30, with her weight likely impacting on back pain.
20. The tribunal (in the absence of the parties) was unable to find evidence in the medical records of back and knee pain, apart from a consultation in January 2020. It further observed that the physiotherapy was done by telephone contact. However, as restrictions in attending normal medical

consultations and referrals have been in place since the arrival of Covid 19 in March 2020, I do not consider that weight can be placed on the absence of medical evidence *per se*.

21. I observe that the applicant is represented in these proceedings by the appointee. The appeal proceeded by way of a paper hearing in the absence of the parties, as the applicant consented to this course of action. However, I have some doubt that it was open to the applicant to do this, as the appeal was the appointee's appeal. By regulation 25 of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 an appointee has a right of appeal and by regulation 39 it is for the "appellant" to indicate that she is content for the appeal to proceed without an oral hearing. It is also clear that the appointee takes issue with many factual findings by the tribunal in her absence and with its interpretation of some of the evidence. In my experience the best way to put across the facts of a case is to attend in person and explain them.
22. While I have some hesitation in adopting this course, in all the circumstances, I consider that I should allow the appeal and set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination. This should be listed as an oral hearing, unless the appointee gives her consent to the matter proceeding on the papers.

(signed): O Stockman

Commissioner

6 October 2021