MT-v-Department for Communities (PIP) [2022] NICom 35

Decision No: C17/22-23(PIP)

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 9 December 2021

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's application for leave to appeal from the decision of an appeal tribunal with reference CN/7825/21/02/D.

2. For the reasons I give below, I grant leave to appeal. However, I disallow the appeal.

REASONS

Background

3. The appellant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 31 March 2021 on the basis of needs arising from mental health issues subsequent to bereavement. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 15 April 2021 along with further evidence. The appellant was asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 30 June 2021. On 11 July 2021 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 31 March 2021. On 12 August 2021, the appellant requested a reconsideration of the decision, submitting further evidence. The Department obtained a supplementary advice note. The appellant was notified that the decision had been reconsidered by the Department but not revised. He appealed out of time,

but the late appeal was admitted by the Department. On 9 November 2021 he waived the right to attend an oral hearing of the appeal.

4. The appeal was considered at a "paper" hearing on 9 December 2021 by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 16 March 2022. 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 25 May 2022. On 22 June 2022, the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

5. The appellant submits that the tribunal has erred in law on the grounds that:

   (i) it misinterpreted relevant law;

   (ii) it failed to make sufficient findings of fact;

   (iii) its proceedings were unfair;

   (iv) it has made perverse findings of fact;

   (v) it made a mistake as to a material fact;

   (vi) it discriminated against him due to his religious and community background;

   (vii) it took too long to prepare a statement of reasons;

   (viii) it failed to consider and address points he had made in a written submission dated 12 April 2022.

6. The Department was invited to make observations on the appellant's grounds. Ms Patterson of Decision Making Services (DMS) responded on behalf of the Department. Ms Patterson submitted that the tribunal had materially erred in law. She indicated that the Department supported the application on one ground. The appellant subsequently wrote on 19 October 2022 to provide an update on his medical conditions.

The tribunal's decision

7. 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 appellant, a prescription list, a fitness for work statement, a consultation report from the HCP and a supplementary

advice note. It had a letter from the appellant attaching statements of fitness for work signed by his general practitioner (GP). The appellant had waived his right to an oral hearing and there was no oral evidence. The tribunal considered the documents before it.

8. In relation to daily living activities, the tribunal observed that the appellant in the PIP2 questionnaire had not stated details of any difficulty with activity 1 (Preparing food), 3 (Managing therapy), 5 (Managing toilet needs), 6 (Dressing/undressing), and 10 (Making budgeting decisions). In relation to activity 4 (Washing/bathing) it accepted that he would lack motivation, awarding 2 points. The tribunal did not accept that the appellant satisfied the relevant descriptors in relation to activity 2 (Taking nutrition), 7 (Communicating verbally), 8 (Reading), or 9 (Engaging with others). In relation to the mobility activities, the tribunal awarded 4 points for activity 1.a (Planning and following journeys). The appellant had not stated any difficulty relevant to mobility activity 2 (Moving around). As the points awarded for the two components were below the relevant threshold, the tribunal disallowed the appeal.

Relevant legislation

9. 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.

10. 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 clamant who obtains a score of 12 points will be awarded the enhanced rate of that component.

11. 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.
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> (2) C's ability to carry out an activity is to be assessed—
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> > (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

12. 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.

13. Leave to appeal is a filter mechanism. It ensures that only appellants who establish an arguable case that the appeal tribunal has erred in law can appeal to the Commissioner.

14. 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.

15. The appellant challenges the tribunal's decision as it concerns the daily living component but not the mobility component. He has made a large number of wide-ranging submissions in relation to the decision of the tribunal and his experience of the appeals process. Some of these fall into the category of complaints about administrative matters, rather than constituting submissions on the question of whether the tribunal has erred in law. As indicated above, my jurisdiction is to determine whether or not the tribunal has erred in law. However, for thoroughness, and acknowledging the appellant's sense of grievance about the administration of his appeal, I will engage with all the matters he has raised.

16. He firstly submits that the location of the tribunal was recorded incorrectly on the Daily Living Component Decision Notice. He does not particularise the nature of his allegation regarding incorrect recording of the place of hearing. However, I observe that the Daily Living Component Decision Notice refers to the location of the hearing as "SIGHLINK OMAGH" [sic], whereas the Mobility Component Decision Notice refers to "SIGHTLINK OMAGH". I understand that his submission refers to the inconsistency between the two decision notices. If that is the case, I consider that this is nothing more than an accidental clerical slip. However, I further observe that the Record of Proceedings for both daily living and mobility components identifies the location of the hearing as being the "APPEALS SERVICE OMAGH". This begs the question of whether the appeal was conducted by a tribunal over Sightlink or in person at a venue in Omagh.

17. The decision notices suggest that the appeal was conducted by way of a Sightlink hearing. This is a secure video conferencing system employed by the Northern Ireland Courts and Tribunals Service. Its use expanded during the Covid-19 pandemic when face-to-face hearings were judged unsafe. It facilitated the participation of appellants by way of an electronic link over the Internet. However, I observe also that the appellant had indicated on 7 November 2021 that he was content for a "paper determination" of his appeal. In other words, he waived his right to an oral hearing.

18. There was no reference to Sightlink in the Record of Proceedings. Therefore, I consider it most likely that the tribunal conducted the hearing in person. It is clearly preferable that there would be consistency between the decision notice and the record of proceedings to enable full understanding of the nature and venue of the hearing. However, I do not consider that the lack of clarity over whether the hearing took place by video link or in person affects the lawfulness of the decision reached. There is nothing unlawful in itself about conducting a hearing by Sightlink and nothing unlawful about conducting an in-person hearing. As the appellant had waived his right to participate by either method, it was irrelevant from the perspective of his potential participation. I consider that no unfairness of any kind arises. I refuse leave to appeal on this ground.

19. In a similar vein, the appellant submits that in the mobility component decision notice, his name was not typed up correctly. The decision notice

relating to mobility component mis-spells his surname, omitting a vowel. As in the case of the tribunal venue, this mistake is a typographical error. The appellant submits that the President of Appeal Tribunals, who has refused leave to appeal in his case, had not conducted his function with due care or attention or he would not have permitted the errors to be repeated. However, the function of the President in addressing the application for leave to appeal was to ascertain whether the tribunal that decided the appellant's case had made errors of law. It was not part of his role to determine whether the tribunal had made typographical errors. It is open to the appellant to request correction of accidental errors by the clerk of the tribunal. That would have been the appropriate course regarding the mis-spelling of the appellant's surname, rather than seeking leave to appeal over it, and I refuse leave on this ground.

20. The appellant further observes that the legal member deciding his appeal did not determine his application for leave to appeal. The legislation that governs this situation is at Article 15(10) of the Social Security (NI) Order 1998 (the 1998 Order), which provides that:

> (10) No appeal lies under this Article without the leave –
>
> > (a) of the person who constituted, or was the chairman of, the tribunal when the decision was given,
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> or, in a prescribed case, the leave of such other person as may be prescribed; …

21. The regulation prescribing such cases is regulation 58(6) of the Social Security and Child Support (Decisions and Appeals) Regulations (NI) 1999 (the Decisions and Appeals Regulations). By this:

> (6) Where an application for leave to appeal against a decision of an appeal tribunal is made—
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> > (a) if the person who constituted, or was the chairman of, the appeal tribunal when the decision was made was a fee-paid legally qualified panel member, the application may be determined by a salaried legally qualified panel member; or
> >
> > (b) if it is impracticable, or it would be likely to cause undue delay, for the application to be determined by whoever constituted, or was the chairman of, the appeal tribunal when the decision was made, the application may be determined by another legally qualified panel member.

22. There are two salaried legal members in Northern Ireland, one of whom is the President of Appeal Tribunals. From other applications that have come before me in the past two years, I am aware that the salaried legal members have taken a greater role in determining applications for leave to appeal, largely for practical reasons related to the effects of the Covid-

19 pandemic on the running of tribunals. However, it is not necessary for a requirement of impracticality or delay to arise in the context of a salaried legal member, as opposed to a fee-paid legal member, making a determination on leave to appeal. No error of law is apparent from this situation.

23. It seems to me that some confusion may have been generated by the fact that the particular fee-paid LQM and the President of Appeal Tribunals share a surname. I am not aware of any family relationship between the two, however, such as would preclude the President adjudicating from a position of potential conflict of interest. On the basis that it is purely coincidental that the surnames of the legal members are the same, I refuse leave to appeal on this ground.

24. More generally, the appellant submits that unfairness occurred because, whereas the tribunal commented on a lack of clarity in his written evidence, he had provided further information in a letter dated 12 April 2022. He submits that this evidence was disregarded unreasonably and unfairly. However, the tribunal made its decision on 9 December 2021. The letter of 12 April 2022 was an application for leave to appeal. In it the appellant has indicated the award of points he believes should have been made in his case.

25. The tribunal decision of 9 December 2021 was a final decision. The further submissions of the appellant of 12 April 2022, addressing the PIP activities, were made after the conclusion of the tribunal proceedings. It is not an error of law for the tribunal to disregard evidence or submissions that have been submitted only after its decision has been made. An application for leave to appeal on grounds of error of law is not a determination of the merits of the appeal. The appellant's submission that the tribunal acted unreasonably and unfairly by disregarding his letter of 12 April 2022 is misconceived. I refuse leave to appeal on this ground.

26. The appellant submits that he has possibly suffered discrimination on the basis of his religion and community background, based on his perception of the likely religious background of the members of the tribunal. Such an allegation is clearly a very serious accusation of misconduct on the part of the tribunal. In essence it is an allegation that the tribunal was biased against him.

27. Before going further with this point, in the interests of openness, I must disclose that I have in the past – by which I mean more than five years ago - occasionally sat in tribunal and attended training with one of the tribunal panel members on a different tribunal – the pensions appeal tribunal. That tribunal determines appeals regarding service pensions under the Naval, Military and Air Forces etc. (Disablement and Death) Service Pensions Order 2006 and compensatory awards under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2005. I have given consideration to the question of whether I should recuse myself in light of the general accusation of discrimination against the tribunal, which includes that

member. However, in a similar way, I have in the past sat and attended training with very many members of social security tribunals. This experience of sitting at different judicial tiers is a natural part of judicial career progression. Any personal connection with past tribunal members is routinely disregarded by me in determining applications and appeals from their decisions. I consider that no conflict arises in the present case and that I can determine the present proceedings fairly.

28. Where a decision maker on a tribunal is a party to a matter or has a direct interest in the outcome, there will be a presumption of bias. However, it is evident that the members of the tribunal had no direct interest in the outcome of the appeal and the threshold for a presumption of bias is not crossed. Similarly, where actual bias on the part of a tribunal is demonstrable on the facts, a tribunal's decision may be vitiated. However, the appellant demonstrates no evidence of actual bias on the part of the tribunal, such as any record of discussion of his religious beliefs or community background. There is no arguable evidence of error of law by reason of bias.

29. There is a further category of bias - perceived bias. It represents a lower hurdle for the appellant since, for a tribunal decision to be challenged under this category, evidence of actual bias does not have to be shown. Instead, following the decision of the House of Lords in *Magill v Porter* [2001] UKHL 67 the question is whether a fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased.

30. The appellant submits that he has suffered discrimination based on his perception that the panel members were from a different religious or community background from himself. I accept that the surnames of the panel members suggest that they came from a different religious or community background to the appellant. However, panel members are sworn to administer justice without fear or favour. They meet briefly – often for the first time - on the day of a hearing and have no particular connection beyond that fact. They make decisions immediately upon consideration of the evidence in a case and, even if they were individually minded to, they would have no time to build the sort of collusive relationship with each other that would be necessary to collectively discriminate. In my working life, I personally have observed social security tribunals administering justice in Northern Ireland for some 42 years without being aware of a single instance of religious discrimination being substantiated.

31. I observe that the appellant is somewhat tentative in his accusation, saying that he "possibly" is the victim of discrimination. Regardless of that, it is still a serious matter to accuse a tribunal of discrimination. However, the statement of reasons for the tribunal's decision indicates to me that the tribunal has sought to apply the relevant legislation to the evidence before it in good faith. There is nothing in its decision to give rise to any suggestion that the tribunal has distorted its analysis of the law or the facts for an ulterior discriminatory purpose. Rather, it has formulated a decision

that is reasoned, coherent and clearly based on that analysis. I consider that there is nothing to make a fair-minded and informed observer conclude that the tribunal was biased against the appellant on the basis of his religious or community background. I refuse leave on this ground.

32. The appellant further submits that the delay in providing the statement of reasons was excessive. The decision was given on 9 December 2021. The statement of reasons was requested by a letter received by the Appeals Service on 7 January 2022. By regulation 53(4) of the Decisions and Appeals Regulations, a statement of reasons should be given to every party to the proceedings as soon as may be practicable. The practicalities of preparing a statement of reasons involve re-issuing a tribunal file to the LQM and arranging a session at which the statement of reasons can be prepared and forwarded to the Appeals Service for printing, before it returns a draft copy to the LQM for approval and signing. The reasons were issued on 16 March 2022. Therefore, it took some 9 weeks for the statement of reasons to be issued. I consider that this was not an unreasonable delay.

33. In any event, the fundamental purpose of reasons is to enable a party to understand why they have won or lost an appeal. Delay in itself is not a factor that would impugn the adequacy and therefore the lawfulness of reasons, unless it was such a long delay as to put a genuine question over the accuracy of the reasons given. I do not consider that 9 weeks is a significant delay in the context of adequacy of reasons or that it has affected the accuracy of the reasons in this case. I refuse leave to appeal on this ground.

34. The appellant makes the further submission that the tribunal had not made sufficient findings of fact. He submits in this regard that the tribunal erred because:

    (a) it failed to acknowledge his letter of 24 September 2021;

    (b) it failed to listen to the recorded telephone HCP consultation;

    (c) it failed to have regard to his letters of 7 August 2021 and 17 September 2021;

    (d) it made no direct contact with his GP despite his request of 7 November 2021.

35. The letter of 24 September 2021 appears in a bundle headed “Additional Information for the Tribunal”, prepared by the Department on 1 October 2021. It refers to his request for a copy of the Notice of Appeal form from the Appeals Service and makes the following observations:

- The letter he received from the Appeals Service was not dated;
- The letter wrongly referred to him by an incorrect first name;

- The prepaid envelope enclosed was addressed to Omagh Appeals Service office rather than the Belfast Appeal Service office, which was where he had been asked to send the form;
- he had therefore posted the Notice of Appeal at his own expense;
- guidance notes were not enclosed with the Notice of Appeal.

36. In the letter, he makes a formal complaint in the letter about the competence of the Appeals Service administration and suggests that there was a deliberate attempt to delay and divert his appeal.

37. The question before me is whether the tribunal arguably erred in law by failing to refer to the letter of 24 September. I consider that it has not. The letter of 24 September 2021 was solely focussed on the administration of the appeal, not the substantive merits of the appeal. Indeed, it was a letter of complaint about the administration of the appeal by the Appeals Service. I have no information about whether that complaint was investigated by the Appeals Service and whether any redress was offered. However, that is a matter entirely for the Appeals Service.

38. The tribunal is a distinct legal entity established under the 1998 Order and is composed of individuals who are entirely independent of government. By contrast, the Appeals Service is a governmental administrative body charged with administering the tribunal. The role of tribunals is to determine appeals, but its members have no connection to or responsibility for the Appeals Service. The standard of administration of the Appeals Service is not a matter within the authority or competence of the tribunal. The sole function of the tribunal was to determine the legal issues in the appeal based on the legislation and evidence before it. The letter of 24 September 2021 contained no evidence relevant to the issues before the tribunal and it is not surprising that it was not referred to expressly by it. I refuse leave to appeal on this ground.

39. The appellant further submits that the tribunal erred in law by failing to listen to a recording of his telephone HCP consultation. The context of this is that he had requested and, after considerable frustration, received a recording of his HCP consultation telephone call on 6 August 2021. In a letter to the Department dated 7 August 2021 he made the following comments on the consultation report:

    - The telephone consultation was correctly recorded as commencing at 10.31, but it incorrectly stated that it ended at 11.04, whereas he observed from his telephone records that the call ended at 10.58. He asked why the assessor recorded it as lasting 6 minutes longer.

    - During the telephone assessment, there were at times large gaps between the questions asked by the HCP that were longer than necessary to record answers. This made him feel anxious.

    - He had related information about a stomach complaint to the HCP, yet this was not recorded among his medical conditions.

- Despite raising the issue of the impact of the Covid-19 lockdowns on his mental health, this was not recorded.

- The dosage of his Ramipril medication was recorded inaccurately.

- The HCP did not ask him questions about a number of the PIP activities, or else ignored aspects of his answers.

- The HCP lacked empathy when he became upset.

- The "informal observations" of the HCP were inaccurate.

40. While disputing all the other grounds advanced by the tribunal, the Department offers some support for the appellant on this ground. Ms Patterson submits as follows:

> "The tribunal has rested its findings on a lack of any account by [the appellant] as to any difficulties in this activity. It has not relied expressly on the Capita report. However, given that [the appellant] states he was not asked questions in relation to several activities, yet the report's functional history would suggest that these activities were addressed, I believe there is merit in this ground of appeal, and that the tribunal may have erred in law in failing to consider adjourning the hearing in order to obtain the assessment recording. I would submit that it would be in the interest of justice for it to have done so."

41. In short, Ms Patterson offers some support for the appellant's case on the basis that it may have adopted an unfair procedure. The aspect of procedure in question is the tribunal's failure to adjourn to obtain a copy of the CD recording of the HCP consultation. In light of this support, I grant leave to appeal on this ground.

42. The category of procedural unfairness as an error of law broadly overlaps with the concept of the right to a fair hearing under Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), incorporated into UK law by the Human Rights Act 1998. As observed above, the appellant in this case had waived his right to an oral hearing of his appeal before the tribunal. He nevertheless placed a significant amount of written submission and evidence before the tribunal. While I appreciate that he may not have felt able to participate in person due to his mental health difficulties, the facility to attend by video link or telephone connection was also available. Therefore, he had the opportunity to participate and to present his case.

43. As noted above, the appellant in his submissions often conflates administrative aspects of the processes of social security decision making with the decision-making exercise itself. Thus, for example, in his letter of

7 August 2021 he details the – doubtless frustrating – endeavours on his part to obtain a copy of the recording of the HCP consultation. He advances a complaint and a request for financial redress based on the time given to obtaining the recording on a CD. Notably, however, he does not submit the CD to the tribunal or ask it to give it any consideration at the hearing of his appeal.

44. Ms Patterson suggests that the tribunal might have adjourned to obtain the CD and that its failure to do so might have been in error of law. Her reasoning for this is that the appellant says that he was not asked questions in relation to all the activities, yet the report's functional history would suggest that the activities were addressed.

45. The appellant does not contest the mobility activities in his application to me, but only the daily living activities. I note that the appellant in the PIP2 self-assessment questionnaire stated that his condition did not affect or prevent him from preparing food (activity 1), managing his treatments (activity 3), using the toilet (activity 5), dressing and undressing (activity 6) or managing money (activity 10). The contested daily living activities were therefore taking nutrition (activity 2), washing/bathing (activity 4), communicating verbally (activity 7), reading (activity 8) and engaging with others (activity 9). In the consultation report, the HCP has indicated by ticking a box at each activity that was not in dispute that "The claimant did not report significant functional problems with this activity in their questionnaire or at consultation and there was no evidence to suggest otherwise."

46. The tribunal had two sources of evidence before it, the self-assessment questionnaire, and the HCP report. The HCP report itself reflects the evidence given by the appellant in the self-assessment questionnaire as it treats the assessment of activities where no significant functional limitation was identified by the claimant differently from those where limitations were claimed. Thus, the HCP report in this case elaborates on the restrictions claimed by the appellant and the evidence relied upon to make the assessment in the individual disputed activities only. The appellant's letter of 7 August 2021 is the only point at which he engages with the daily living activities themselves. However, rather than take issue with the issue of whether he could or could not perform the disputed activity, what the appellant does is query the content of the HCP report.

47. Thus, for example, the functional history referred to by Ms Patterson makes references to the appellant enjoying cooking and saying that he had cooked for his parents when he was caring for them. When addressing the HCP report, what the appellant disputes is that he told the HCP that he could peel and chop vegetables. However, the appellant does not deny that he can and does cook. The tribunal in its statement of reasons observed that the appellant stated in relation to a number of activities that "he was not persuaded that a zero score for this question was a fair or reasonable position to hold" but observed that he did not provide any evidence of what his difficulty was with the activity. Similarly, I note that

his contention in his letter of 7 August was not that he could not peel and chop vegetables, but that he had not said that he could. He did not actually offer any statement to the effect that he could not peel and chop vegetables. This was against a background of no medical evidence indicating any condition that would limit his ability to peel and chop vegetables. In a situation where there was no evidence to the effect that he had any physical disability affecting his upper limbs and hands, and where there was no statement from the appellant submitting that he had, it would seem to me that the tribunal made a rational decision and did not require to investigate what precisely was said to the HCP.

48. Similarly, the appellant disputed that he said that he could eat and drink unaided, that he could get in and out of a bath and shower, that he changed clothes every day or that he could manage his toilet needs. However, there is nothing to indicate that he has any limitation with eating, drinking, showering, dressing, or using the toilet, and in particular no statements from him and no evidence from him to the effect.

49. At one point, I was minded to direct the appellant to provide a copy of the CD to Ms Patterson and to direct the Department to provide a transcript of the consultation. However, the ultimate function of the tribunal is not to review the evidence on which the Department's decision was based, but to receive the evidence of the appellant and to decide all the issues afresh. An examination of complaints about the precise duration of the consultation and what exactly was said to the HCP is a futile exercise. The proper way to contest the evidence contained in the assessment of the HCP is to provide contrary evidence in relation to the disputed activities. I am not satisfied that the tribunal has erred in law by failing to obtain the recording of the HCP consultation. I do not see any basis for saying that it acted unfairly for that reason.

50. The appellant also, in this context, made general submissions to the tribunal relating to the nature of the assessment and the qualifications of the HCP as a registered nurse. However, these are matters of government policy beyond the remit of the tribunal. The specific regulation that gives rise to the assessment by the HCP is regulation 9 of the Personal Independence Payment Regulations (NI) 2016. This provides:

> 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—
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> (a) attend for and participate in a consultation in person;
>
> (b) participate in a consultation by telephone.
>
> (2) …
>
> (5) In this regulation, a reference to consultation is to a consultation with a person approved by the Department.

51. Regulation 9(5) is the key. It is simply enough that the person holding the consultation has been approved by the Department for that purpose. The level of qualification of that person is not a relevant matter.

52. The appellant next submits that the tribunal failed to make contact with his GP despite his request of 7 November 2021. This letter encloses a sick line addressing the appellant's capacity to work. It indicates that "this should be more [than] sufficient in highlighting my position". I also observe that the appellant's GP has advised him that "the protocol for handling requests for further medical information which may be deemed necessary" is [for the tribunal] to make direct contact with the surgery. In the absence of any request from the tribunal to his GP he submits that the tribunal proceedings were unfair.

53. It should be noted that the appellant did not request the tribunal to obtain evidence from his GP, but rather pointed out that, if further evidence was desired by the tribunal, it would need to contact the GP directly. He had provided evidence of incapacity for work, which had no direct relevance to the matters for determination by the tribunal. Whereas a sick line may establish unfitness for work, it has no particular bearing on the question of whether a person's disability limits the daily activities and mobility relevant to PIP. The evidence in the PIP2 questionnaire and the HCP report addressed the daily living and mobility activities directly and was before the tribunal.

54. I consider that there was no reason for the tribunal, in circumstances where the appellant had waived his right to attend the hearing, to consider that the material before it was insufficient to decide the appeal. If the appellant had wished to present further medical evidence for the consideration of the tribunal, it was certainly open to him to do that. However, it was not the responsibility of the tribunal to seek further medical material of its own initiative. I understand that, even if the appellant had requested the tribunal directly to ask his GP for evidence, the GP would have been precluded by data protection legislation from supplying such confidential personal material pertaining to the appellant. I do not accept that the proceedings were unfair on the basis that the tribunal did not seek further evidence from the appellant's GP.

55. The appellant also refers to the record of proceedings, submitting that the LQM's reference to his appeal against a decision made on 1 July 2021 is erroneous in law, as the decision under appeal was in fact dated 11 July 2021. His point is that the frequent typographical errors demonstrate a general absence of care in reaching the decision in his case. Yet again, however, I consider that the error in the date that the appellant relies upon is simply another administrative slip. Such errors may well speak to the general present state of public administration services. However, they do not indicate the presence of a legally erroneous approach by the tribunal. I refuse leave to appeal.

56. As a final matter, the appellant has provided an update of his medical condition dated 19 October 2022. However, the legislation under which the tribunal operates precludes it from having regard to circumstances not obtaining at the date of the decision under appeal (Article 13(8)(b) of the 1998 Order). As the date of decision was 11 July 2021, the tribunal cannot be faulted for not having regard to subsequent changes in the appellant's circumstances. That might be a matter for a new claim, but it does not have relevance to the present proceedings.

57. For the reasons given above, I have allowed leave to appeal on a single ground. However, I disallow the appeal.

(signed): O Stockman

Commissioner

22 November 2022