

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 23 November 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 LD/3707/20/02/D.
2. An oral hearing of the application has not been requested.
3. For the reasons I give below, I grant leave to appeal. I allow the appeal and I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

4. The applicant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 17 February 2020 on the basis of needs arising from depression, anxiety, and thyroid cancer. He was asked to complete a PIP2 questionnaire to describe the effects of his disability and returned this to the Department on 16 March 2020. The applicant was asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 6 May 2020. On 23 June 2020 the Department decided that the applicant satisfied the conditions of entitlement to the standard rate of the daily living component of PIP from 17 February 2020 to 28 April 2023 but did not satisfy the conditions of entitlement to the mobility component. The applicant requested a reconsideration of the decision. The Department obtained a supplementary advice note. The applicant

was notified that the decision had been reconsidered by the Department but not revised. He appealed.

5. The appeal was considered at a hearing on 23 November 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, while maintaining the award of standard rate daily living component. The applicant then requested a statement of reasons for the tribunal's decision, and this was issued on 3 May 2022. 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 31 October 2022. On 25 November 2022, the applicant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The applicant, represented by Mr McGuinness of Advice North West, submits that the tribunal has erred in law by failing to apply the law relating to daily living activity 9 (Engaging with others) correctly, when addressing the role played by the applicant's wife.
7. The Department was invited to make observations on the applicant's grounds. Mr Clements of Decision Making Services (DMS) responded on behalf of the Department. Mr Clements submitted that the tribunal had materially 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, a telephone consultation report from the HCP and supplementary advice. The applicant attended the hearing and gave oral evidence, represented by Mr McGuinness. The Department was not represented.
9. The tribunal heard evidence from the applicant, accepting that he was suffering from thyroid cancer and the effects of treatment. It heard that he had experienced mental health difficulties for 7 or 8 years, following a traumatic event. The tribunal observed that the applicant had been awarded 11 points for daily living activities by the Department. Mr McGuinness indicated that the issues in dispute were activity 9 (Engaging with others) and mobility activity 1 (Planning and following a journey). The tribunal noted that he sometimes refereed football matches and did not accept that he needed social support from people training or experienced in assisting people to engage in social situations. It maintained the award of 11 points for daily living activities and awarded 4 points for mobility activity 1.b. That was insufficient to change the outcome from that resulting from the Department's assessment.

Relevant legislation

10. 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.
11. 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.
12. 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

13. 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.
14. 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.
15. 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.
16. Mr McGuinness submitted that the tribunal has erred in law on the issue of activity 9. He submitted that the panel accepted that the applicant required support from his wife to manage this activity but found that this support did not meet the definition of “social support from persons training or experience in assisting people to engage in social activities”. He submitted that in *Secretary of State for Work and Pensions v MM* [2019] UKSC 34, the UK Supreme Court had given guidance on the question of whether support needs to be provided at the same time as engagement with others, and whether prompting could constitute social support. It also found that friends and family could fall within the category of those who are trained or experiences in assisting people to engage in social situations. He submitted that the tribunal had erred in its consideration of the role of the applicant’s wife.
17. Mr Clements responded with observations on behalf of the Department. He accepted Mr McGuinness’ analysis of *SSWP v MM*. He further observed that in *SL v Secretary of State for Work and Pensions* [2016] UKUT 147, Judge Hemingway had indicated that there is nothing in the definition of social support to suggest that the experience necessary had

to derive from some sort of professional work. He noted that this Upper Tribunal decision had been approved in Northern Ireland by Chief Commissioner Mullan in *CD v Department for Communities* [2018] NI Com 30.

18. Mr Clements noted the words of Lady Black at paragraph 37 of *SSWP v MM*, when she said:

“There will, inevitably, be cases in which it is not immediately evident whether descriptor 9c applies, and it is only after scrutinising the facts particularly carefully that the decision maker will be able to reach a determination. Although the provision is concerned with the help the claimant needs, rather than with the help which he or she is actually getting in practice, it seems likely that, in many family/friends cases, someone will already be carrying out the supportive role in face to face engagements. Where this is so, the assessment/decision making process will be assisted by looking at the elements of the support that they actually provide, how they have come to know what to do, whether or not the sort of help that they provide could be provided by any well-meaning friend or family member, and what additional help (if any) is required. Exploring these issues will no doubt be a sensitive task.”

19. Mr Clements submitted that the tribunal was aware of *SSWP v MM*, but had not followed the above approach. It did not investigate whether the sort of help that the applicant’s wife provided for him could be provided by any well-meaning friend or family member, and nor did it investigate whether she was experienced in assisting people to engage in social situations. He submitted that Lady Black’s remarks were *obiter*, and that a tribunal that approached a case in a different way would not necessarily err in law, with much depending on the facts of an individual case.
20. Ultimately, however, he accepted that the tribunal erred in the instant case when it failed to investigate whether the support given by the applicant’s wife was social support. It had found that “he did occasionally referee football and manage engagements with the prompting and support of his wife”. The implication of its decision was that it did not accept that the support of the applicant’s wife constituted social support. However, it did not expressly find that the support of the applicant’s wife was not social support. Ms Clements supported the application from the perspective that the tribunal’s reasons were therefore unclear.
21. On the basis of the Department’s support for the application, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal. I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

5 April 2023