

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 19 May 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. These are two applications by a claimant for leave to appeal from the decisions of two appeal tribunals with references BM/10579/22/02/D and BM/12621/22/02/D. As the applications involve similar issues of fact and law, and as they were heard together by the tribunal below, I consider that it is appropriate for me to consider and determine them together.
2. For the reasons I give below, I grant leave to appeal. I allow the appeals and I set aside the decisions of the appeal tribunal. I refer the appeals to a newly constituted tribunal for determination.

REASONS

Background

3. The appellant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 10 September 2021 on the basis of needs arising from fibromyalgia. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 4 October 2021. The appellant was asked to participate in a telephone consultation with a healthcare professional (HCP) and the Department received an audited report of the consultation on 16 December 2021. On 22 January 2022 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 10 September 2021. The appellant requested a reconsideration of the decision, submitting further evidence from her

general practitioner (GP). She was notified that the decision had been reconsidered by the Department but not revised. She appealed but waived the right to attend an oral hearing of the appeal.

4. The first appeal was considered at a hearing on 7 March 2023 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 18 May 2023. 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 28 July 2023. On 16 August 2023 the appellant applied to a Social Security Commissioner for leave to appeal.
5. The claimant had made a fresh claim for PIP in the meantime from 28 April 2022, again on the basis of needs arising from fibromyalgia. She submitted a PIP2 questionnaire on 24 May 2022 along with further medical evidence. The appellant was again asked to participate in a telephone consultation with an HCP and the Department received a report of the consultation on 25 July 2022. On 11 August 2022 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 28 April 2022. 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. She appealed, but again waived the right to attend an oral hearing of the appeal.
6. The second appeal was also considered at a hearing on 7 March 2023 by the same tribunal as above. The tribunal disallowed the appeal. The appellant then requested a statement of reasons for the tribunal's decision, and statements of reasons were issued on 18 May 2023. While not identical to the statement of reasons for the first appeal, they are inter-related. 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 28 July 2023. On 16 August 2023 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

7. In both the first and the second application, the appellant submits that the tribunal proceedings were unfair as she had a disability. In her application to the LQM for leave to appeal, she had set out factual submissions about her day to day activities. She sets out further factual submissions in her application to the Office of the Social Security Commissioner, submitting in particular that she feels she has been judged on the issue that she goes to work.
8. The Department was invited to make observations on the appellant'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

9. The LQM has prepared statements of reasons for the tribunal's two decisions. In these, it records that it did not see any significant change between the two periods in issue. I can see that the tribunal had documentary material before it consisting of the Department's submission in the first case, containing the PIP2 questionnaire completed by the appellant, a telephone-based consultation report from the HCP, a letter from her GP and a HCP's supplementary advice to the Department in response. In the second case, it had a later PIP2 questionnaire completed by the appellant, a further GP letter, a further consultation report from a telephone consultation with a HCP, letters from physiotherapy and a consultant, and a further supplementary advice note. It also had sight of the appellant's medical records. The appellant waived her right to an oral hearing and therefore there was no oral evidence.
10. The tribunal acknowledged that there were difficulties in assessing evidence in the absence of an appellant and noted that the HCP consultation was conducted by telephone due to Covid 19 restrictions, which limited the value of the HCP report. It accepted that the appellant was affected by back and leg pains and by fatigue and had genuine difficulties. It observed comments in the medical notes that indicated good function. It also observed her ability to continue to work in part-time employment, as well as comments related to exercising on a regular basis. It accepted that there may be some limitations with daily living activity 1 (Preparing food) and activity 4 (washing and bathing), awarding 4 points for descriptors 1.b and 4.b. It also accepted that there may be limitations with mobility activity 2 (Moving around), awarding 4 points for descriptor 2.b. As the points awarded did not reach the threshold for an award of either component, the tribunal disallowed the appeals.

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 appellants 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 appellant basically restate aspects of her limitations in physical health and how these affect daily activities. She submits that she has been judged because of her ability to do a part-time job. Mr Clements, for the Department, has made observations in response to the appellant's submissions. In relation to the tribunal's statement of reasons, he has offered some support for the appellant's case. Specifically, he says that:

“Whilst I understand how [the appellant]’s employment as a receptionist may indicate an ability to perform certain PIP activities, such as engaging with other people face to face, it is not entirely clear to me exactly how her employment in a sedentary job indicated an ability to do “most of the activities” under consideration. The tribunal did not state which activities it was referring to in particular, nor did it say which aspects of [the appellant]’s job indicated that she could perform the relevant activities”.

18. He made reference to Chief Commissioner Mullan’s decision in the case of *AC v Department for Communities* [2019] NI Com 32. He refers to paragraph 20 where it was stated:

“20. The appeal tribunal has placed a strong emphasis on the fact that the appellant worked. The rules of entitlement to PIP have no specific connection to work in that participation in full or part-time employment does not prohibit entitlement to PIP. Indeed it is the case that there are many claimants to PIP who have a valid and legal entitlement, satisfying the legislative rules of entitlement, and, who are also working. It is the case that there is nothing at all inherently wrong with an adjudicating authority, including an appeal tribunal, who seek to rely on evidence of working, including specific activities

associated with a particular form of employment, as support for a conclusion that a particular activity or descriptor does not apply to a claimant. If such an approach is taken, however, there is, in my view, a duty to undertake a thorough assessment of the work-related activities and what, precisely, those activities entailed...”

19. Mr Clements submits that the tribunal has not undertaken a thorough assessment of the work-related activities in the present case. In this context, he submits that it has given insufficient reasons for finding that the appellant’s employment indicated an ability to do most of the activities under consideration. It is on this basis that he supports the application.
20. In light of Mr Clements’ support, which demonstrates that the appellant has raised a ground which is arguable, I grant leave to appeal.
21. Returning to the tribunal’s statement of reasons, it is clear that the tribunal awarded points for activity 1 on the grounds of fatigue requiring her to sit down, and for activity 4 on the grounds of requiring to use a shower seat. It accepted that she had genuine difficulties, finding that this was supported by the GP notes and records and various investigations and treatment efforts. However, it also found comment in the notes that indicated good function, with references to a good range of movement and muscle tone.
22. It declined to award points to the appellant for activity 6 (Dressing/undressing) on the grounds of discomfort in her hands. In particular, it noted her ability to drive, which it felt demonstrated a degree of manual dexterity. It also referred to comments in the GP notes about her exercising on a regular basis. More generally it said:

“The appellant is to be commended for continuing in part-time employment. We appreciate that some of her work to reduce have changed [sic]. Nevertheless, we felt that her employment indicated an ability to do most of the activities we are considering”.
23. The tribunal had indicated at a number of places in the statement of reasons that there are restrictions in trying to determine an appeal on the papers. Covid had prevented an in person examination by the HCP. It also observed that she had requested the tribunal to determine the appeal on the papers. Therefore, she had not been seen in person at any point in the adjudication process.
24. Whereas the tribunal placed weight on factors in the medical notes generally, and on ability to drive in assessing activity involving use of the hands, it did not spell out any further than appears in the above statement how her employment “indicated an ability to do most of the activities we are considering”. The appellant was not present at the hearing, and it is not evident that the nature of her employment duties were set out by her in any detail.

25. Mr Clements for the Department has advanced submissions in the appellant's interests. While I see that the tribunal has not placed sole reliance on the issue of the appellant's employment, there is clearly force in his submission that the tribunal did not explore the appellant's employment duties in any depth.
26. Chief Commissioner Mullan has indicated that tribunals are entitled to consider the work roles carried out by appellants. He cautions, however, that if such an approach is taken, there is a duty to undertake a thorough assessment of the work-related activities and what, precisely, those activities entailed. The appellant was not present to discuss her employment activities, and the tribunal had no specific evidence of them. While a tribunal may have general knowledge of what particular jobs may entail, I consider that it cannot make assumptions in individual cases. It cannot know what adjustments may have been made to employment duties in the light of an individual appellant's circumstances. While it can directly ask an appellant who is present at a hearing about an employment role, it cannot do so where there is no appellant present as in this case.
27. While the tribunal did not place total reliance on the appellant's employment, it was clearly a factor that was material to the outcome of the appeals. In the light of its failure to investigate the nature of the employment duties, it follows that I must find that it has materially erred in law. I allow the appeals and I set aside the decisions of the appeal tribunal. I refer the appeals to a newly constituted tribunal for determination.

(Signed): O Stockman

Commissioner

13 December 2023