

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Application to a Social Security Commissioner
for leave to appeal on a question of law from the decision of a Tribunal
dated 15 June 2023

DECISION OF THE SOCIAL SECURITY COMMISSIONER

I grant leave to appeal. I deal with the substantive appeal, which I allow. I set aside the decision of the Tribunal sitting at Belfast on 15 June 2023 as being in error of law. I remit the matter back to a freshly constituted Tribunal with the following directions.

Directions

1. The fresh appeal will be listed before a new tribunal, that is, one with none of the same members as previously. It will be listed as an oral hearing, and it is in the claimant's interests to attend, either in person, by phone or virtually, as she prefers, or as is practical.
2. She must tell the Appeals Service (TAS) in writing (post or email as is usual) which sort of hearing she would prefer within 14 days of the issue of this decision.
3. She should understand that the tribunal is looking at how her medical conditions affected her function during the qualifying period before the decision under appeal. The tribunal can consider things that have happened since then only if they shed light on what the position was likely to have been at the date of the decision.
4. A Chairman of TAS may extend time or make any further necessary listing directions.

REASONS

Proceedings before the Commissioners

1. As I am granting the application for leave to appeal, I refer to the applicant as either the appellant or the claimant.
2. The tribunal decision before me adopted the conclusion of the decision maker as to there being no entitlement to the Personal Independence Payment (PIP) daily living component. It also removed the mobility component, which the Department for Communities (the Department) had put into payment at the standard rate, leaving the claimant without an award.
3. The application for leave to appeal to the Commissioner was refused by the legal member of the tribunal that heard the appeal. I am looking again at that application.
4. The appellant is in person, and Mr Clements acts for the Department. An oral hearing is not necessary for justice to be done. I am able to decide the matter fairly on the papers before me.
5. The Department has had the opportunity to make observations through Mr Clements. In his helpful submission he supports the appeal, although for different reasons to those put forward by the claimant. He is content that I decide the appeal without further reference to the department if I decide to grant leave.
6. In all the circumstances I am able to deal now with both the application for leave and the substantive appeal.

Background

7. The matter arises following an appeal by the claimant about her entitlement to a (PIP). She made a claim on 6 May 2022, and underwent an assessment over the telephone on 25 July 2022. The healthcare professional who spoke to her was of the view that she had restrictions in both the activities of daily living and in her mobility. The disability assessor recommended six points for the problems in daily living activities: her need for aids for preparing food, washing, and bathing and managing toilet needs scored two points in relation to each, and her ability to walk more than 20 but not more than 50 metres scored ten points under the mobility descriptors.
8. On 12 August 2022, the decision maker accepted that recommendation. They made no award for the daily living component, her score being less than eight points, but her score of ten points for mobility problems led to an award of that component at the standard rate.

9. Following the mandatory reconsideration procedure which did not change that decision, the claimant appealed; the appeal was heard on 15 June 2023.
10. The tribunal added one point for difficulties in managing therapy: six points became seven points, but still the requirement of eight points for a standard award of the daily living component was not met. It reduced her points under the mobility descriptors from ten to four, finding that she could walk between 50 and 200 metres within the terms of the descriptors and associated provisions. Accordingly, her award of the standard rate of the mobility component was taken away.
11. There is an issue before me as to whether the appellant had wanted the tribunal to look at the mobility component at all; she might have wanted that considered to raise it to the higher rate, but she says not. This is a matter of importance, and I explain it below.

The arguments of the parties

The appellant

12. The application to the Commissioners has identified areas of disagreement in which it is said that the tribunal fell into error of law.

The respondent

13. In his submission Mr Clements explains the background and set out the appellant's arguments. In its conclusion, the department supports the appeal, having analysed another matter which he sees as critical to a fair process, and merits the re-hearing of the appeal. I agree with him.

My conclusions on the appellant's arguments

14. As I am allowing the appeal on a different basis to those the appellant has put forward, I need say little about the detailed points she made. They are about the factual matters, and not the potential legal errors. I know how difficult it is for unrepresented claimants in this point of law arena to understand the distinction, which is why I look at the overall picture not just the matters she raises, and I am allowing the appeal for different reasons to those put forward as I find that there was a legal error by the tribunal that was material to the outcome; put another way, it was a mistake that mattered, at the end of the day.

The relevant legislation and case law

15. A tribunal need not consider all aspects of the decision before it: under Article 13(8)(a) of the Social Security (Northern Ireland) Order 1998, it need not investigate matters not raised by the appeal.

16. In practical terms here that means it was not necessary for the tribunal to consider the mobility component if the appellant was not asking it to, although it has the power to do so if it thinks it appropriate. If it chooses to look at a component or descriptor not in dispute it may, and it is entitled to make a decision less favourable to the claimant than that of the department; however, before it does so there are certain procedural safeguards that it must follow.
17. These have been established by case law, pertinently a case cited by Mr Clements in which the various safeguarding principles are set out by Mr (now Chief) Commissioner Mullan, *C15/08-09 (DLA)*. Further, in *DM v Department for Social Development (DLA)* [2010] NICom 335 Mr Commissioner Stockman made plain the importance of the duty to give an appellant notice of a tribunal's intention to make a less favourable award; that notice, (or I might say warning) needs to be sufficient to allow an appellant the opportunity to consider whether they require an adjournment to provide further evidence on the issue, or whether they might wish to withdraw the appeal. In *DP v Department for Communities (PIP)* [2020] NICom 1 the Chief Commissioner confirmed that the principles set out in these two cases apply also to those where the PIP is being considered.
18. I would stress here that these principles, which are about basic fairness, must apply with particular rigour where an appellant is not represented by a lawyer or other person familiar with this legal area. That an appellant positively indicates in a form provided by TAS that they have received a document setting out the powers of the tribunal and wish to continue with the appeal with knowledge of the tribunal's powers in relation to an existing award does not extinguish the duty on the tribunal to explain the risk to them.
19. As to whether the mobility component was in dispute before the Belfast tribunal, Mr Clements points out that there is a mention in the record of proceedings that the appellant did want it considered, but she is adamant that she was content with the standard rate award.

The error of law here

20. That single comment is the only reference to the issue. There is nothing to indicate that during the hearing the appellant was asked about matters that would be pertinent to her having said she wanted the higher rate of the mobility component to be considered. The comment relied upon as to her saying that appears to me to be part of a generic point that is being made, and the record and statement contains a number of what appear to be stock paragraphs regarding procedural issues. This particular sentence jars as out of context without some relevant questioning on the issue, and I cannot rule out the comment being part of a cut and paste from another source.

21. The department's submission refers to *CS/343/1994*, a case in which Mr Commissioner Rice cautioned against going behind the record of proceedings without clear and convincing evidence that the position has not been properly represented. I am of the view that convincing evidence exists in the apparent lack of any relevant questioning, coupled with the absence of any written submissions from the appellant as to the mobility aspect, in circumstances where she made explicit written observations on the various activities in dispute in the daily living category.
22. I note further that *CS/343/1994* was decided well before the routine use of computers in preparing judgments, and thus the possibility of generic explanatory paragraphs was not commonplace. I do not wholly deprecate their use-it is often appropriate to make generic points, but it is important to check that they do indeed apply entirely in each case.
23. Whether that happened here or not, it remains that there is no indication the appellant was directly warned that a possible consequence of the tribunal considering the mobility element was to place the ongoing award at risk.
24. This is wholly conceded by the department at paragraphs 14 and 15. It will be helpful if the submission is available to the fresh tribunal.
25. The failure to explain that it had powers to make a less favourable award than the one already made, that it was considering doing so, and on what grounds, was an error of law of real significance to the outcome of the hearing. As Mr Clements says, it amounts to a procedural irregularity that has resulted in unfairness and rendered the decision erroneous in law.

Before the new tribunal

26. My setting aside of the decision of the Belfast tribunal reinstates the departmental award of the mobility component at the standard rate.
27. I am grateful to Mr Clements for drawing the two cases I refer to above so clearly to my attention. In my turn I commend them to the new tribunal prior to any decision to consider the mobility award. It may, of course, decide not to do so at all in light of the appellant's indications before me that she is content with the award of the standard rate of mobility.
28. The next tribunal will look at the evidence afresh and make its own findings on the appellant's likely difficulties and capability in relation to the disputed descriptors. Those findings will be based upon its analysis of what it reads and hears.

29. As always, I caution the claimant that success before me on a point of law is no indication of what the result will be at the fresh tribunal, which is examining the facts.

A handwritten signature in black ink, appearing to read 'P Gray', written in a cursive style.

(signed); P Gray

Deputy Commissioner (NI)

27 March 2024