

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 30 October 2019

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 EK/5261/19/02/D.
2. For the reasons I give below, I grant leave to appeal. I allow the 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.
3. This has been the second time that a Commissioner has set aside a tribunal decision in the present appeal. Regrettably, this means that the new tribunal is considering issues as long ago as June 2016. The tribunal should take particular care to ensure that all factual matters in dispute are addressed and that any prospective findings based on circumstantial evidence, such as non-attendance at appointments, are put to the appellant at hearing for responding observations.

REASONS

Background

4. The appellant claimed personal independence payment (PIP) from the Department for Communities (the Department) from 28 June 2016 on the basis of needs arising from Parkinson's disease, haemochromatosis, incontinence, high blood pressure, disc degeneration in the lower back, neck pain, menopause and depression.

5. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 25 July 2016 along with further medical evidence. The appellant was asked to attend a consultation with a healthcare professional (HCP) and the Department received a report of the consultation on 22 August 2016. The appellant submitted further medical material. On 5 September 2016 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 28 June 2016. The appellant requested a reconsideration of the decision, submitting further evidence. She was notified that the decision had been reconsidered by the Department but not revised. She appealed.
6. Her appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member on 12 April 2017. The tribunal disallowed the appeal. However, the tribunal's decision was later set aside by the Chief Social Security Commissioner in the decision with neutral citation *AC v Department for Communities* [2019] NI Com 32, and was remitted to a newly constituted tribunal for determination. That tribunal heard the appeal on 30 October 2019. It also disallowed the appeal.
7. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 18 June 2020. 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 17 August 2020. On 18 September 2020 the appellant applied to a Social Security Commissioner for leave to appeal.
8. The application was received after the expiry of the relevant statutory time limit. However, on 11 January 2021 the Chief Social Security Commission admitted the late appeal for special reasons under regulation 9(3) of the Social Security Commissioners (Procedure) Regulations (NI) 1999.

Grounds

9. The appellant, represented by Ms Williams of Community Advice Fermanagh, submits that the tribunal has erred in law by:
 - (i) not fully considering the activity of Managing toilet needs on the basis of overlooking the use of incontinence pads as an aid;
 - (ii) not fully considering the activity of Dressing/undressing repeatedly or in a timely manner given Parkinson's disease symptoms and pain due to fibromyalgia.

10. The Department was invited to make observations on the appellant's grounds. Mr Killeen of Decision Making Services (DMS) responded on behalf of the Department. Mr Killeen accepted that the tribunal had erred in law in relation to the second ground advanced, but submitted that the tribunal had not materially erred in law as this would lead to an insufficient award of points to alter the outcome of the appeal. He indicated that the Department did not support the application for that reason.

The tribunal's decision

11. 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, various medical reports and medical record printouts, a consultation report from the HCP and the previous tribunal decision and Commissioner's decision *AC v Department for Communities* [2019] NI Com 32. It also had a written submission from the appellant's representative and medical evidence handed in at the hearing. The appellant attended and gave oral evidence, represented by Ms Williams of Community Advice.
12. The tribunal was considering a period which was relatively long ago, with a claim in June 2016 and decision in September 2016. It addressed the medical evidence, highlighting particular elements from the Parkinson's disease nurse, consultant neurologist, physiotherapist, ICATS Podiatrist and GP attendance, along with an MRI scan and noting a right hip injection. Considering how the appellant was at that time, it found that her mobility was affected – on the basis of medical evidence – with reduced mobility and poor balance on the left side. While it felt that she could manage in excess of 200 metres, it felt that she could not accomplish this repeatedly, awarding 4 points for descriptor 2.b. On daily living, it accepted that she required an aid to prepare and cook food, accepting descriptor 1.b, and had difficulties with washing and bathing, accepting descriptor 3.e, but declined to make any other award of points.
13. It found no evidence, or declined to accept evidence, to support the appellant's claim of difficulties taking nutrition, managing medication, toileting, dressing/undressing, engaging with other people and making budgeting decisions. Communication and reading were not claimed as difficulties. In particular, it found no cognitive limitations and that difficulties experienced as a result of fibromyalgia were not present for the majority of the time. It found that the appellant was motivated to continue as best she could with work, which involved dealing with the public.

Relevant legislation

14. 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.
15. 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.

Assessment

16. 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.
17. 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.
18. 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.
19. Mr Killeen offers some support for the second ground submitted by the appellant. On the basis that each of the parties submits that an element of the tribunal's decision is in error of law, I consider that I should grant leave to appeal.
20. The ground on which support is offered by the Department relates to the aspect of activity 6 (Dressing and undressing). In particular, Mr Killeen accepted that there was inconsistency between the tribunal's findings on activity 1 and activity 3 with its findings on activity 6. However, as the support at its height would lead to an award of an additional 2 points, he observed that this would not alter the outcome of the appeal. On this basis he submitted that it was not a material error.

21. The other ground on which the appellant relied related to activity 5 (Managing toilet needs). The appellant indicated that she had been supplied with a raised toilet seat and used disabled toilets at work. She had been referred to the incontinence service in July 2016. She used incontinence pads which she purchased herself.
22. The tribunal accepted that the appellant complained of bladder urgency and frequency and that she had been referred to the incontinence service. It noted, however, that she had not attended (being discharged in January 2018). It heard that the appellant had been given a raised toilet seat and used disabled toilets, but found that this was over three years after the date of the claim under appeal. It noted few GP references to (urgency and frequency) difficulties and no references to loss of control. It said “we see no reference to pads”. It decided on the evidence that the appellant could manage her own toilet needs unaided at the date of claim.
23. Whereas the medical records indicated that the appellant had been discharged by the incontinence service for non-attendance, the appellant submitted that she had not received appointment notifications. This evidence is not probative to any great extent. However, the key issue was whether the appellant used aids. In this context, use of incontinence pads would amount to use of an aid (see the decision of Chief Commissioner Mullan in *CD v Department for Communities* [2018] NI Com 30). A finding that the appellant had not followed up her appointments with the continence advisory service might imply that her condition was not as bad as she stated.
24. The appellant submits that the tribunal had erred in law by “not fully considering” activity 5 in that the appellant used incontinence pads that she purchased for herself. I interpret this expression as meaning that the tribunal did not adduce evidence regarding the use of incontinence pads and thereby failed in its inquisitorial duty.
25. In her PIP2 questionnaire the appellant said:

“I have great urgency and frequency to pass water. I must always have access to a toilet. I just cannot hold on. I have an appointment with continence service 21/7/16”.
26. She did not refer to the use of pads in the PIP2 or to the HCP. It does not appear that she gave evidence to the tribunal that she used incontinence pads or that they were referred to in any evidence submitted by her to the tribunal.
27. However, the record of proceedings before the tribunal of 12 April 2017 was included in the bundle of documents before the tribunal of 30 October 2019. In that, the earlier tribunal recorded:

“As regards toileting, she applies pads, if she has to go to the toilet then she must go immediately. Apart from that she is able to toilet herself ok”.

28. Nevertheless, in that context, the earlier tribunal had said:

“The Tribunal did not believe that the Appellant needed to use an incontinence pad most of the time”.

29. The issue before that previous tribunal was one of credibility as to the use of incontinence pads. The referral to the continence advisory service is generally supportive of a problem. However, the present tribunal noted that the appellant had not attended two appointments with the continence service after being referred. The unspoken implication of voluntary non-attendance is that the problem had resolved or was not severe enough to warrant further attendance.

30. In her submissions to me, however, the appellant has said that she did not “receive these said appointments”. It raises the question of fairness as regards whether her non-attendance was put to the appellant for comment.

31. In the absence of any direct finding by the present tribunal on the use of incontinence pads, whereas it was raised as an issue before the previous tribunal, it also seems to me that something has been omitted in the tribunal’s treatment of activity 5 in general. The tribunal states that it sees no reference to pads. However, the earlier proceedings were before it and include just such a reference.

32. Mr Killeen has accepted that the tribunal has made an error of law, albeit not a material error. I retain a discretion whether to set aside the tribunal decision. I consider that I should accept that the tribunal has erred in law on the agreed ground, but also that I must set aside the decision of the tribunal. This is because I have lingering doubts about the treatment of the issue of activity 5 in terms of findings of fact on the use of incontinence aids and the resulting fairness of the proceedings.

33. I allow the appeal. I set aside the decision of the appeal tribunal and I refer the appeal to a newly constituted tribunal for determination.

(signed): O Stockman

Commissioner

1 March 2021