

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

DISABILITY LIVING ALLOWANCE

Application by the above-named claimant for
leave to appeal to a Social Security Commissioner
on a question of law from a tribunal's decision
dated 19th May 2022

DETERMINATION 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/5980/21/37/D.
2. For the reasons I give below, I grant leave to appeal. I allow the appeal and I set aside the decision of the appeal tribunal under Article 15(8)(b) of the Social Security (NI) Order 1998.
3. I refer the appeal to a newly constituted tribunal for determination.

REASONS

Background

4. The appellant is a child born in 2007. On the appellant's behalf, his mother (the appointee) claimed disability living allowance (DLA) from the Department for Communities (the Department). He was awarded DLA from 2 December 2009 to 18 February 2020, most recently at the high rate of the care component and the high rate of the mobility component. From 19 February 2021 the appointee made a renewal claim on the basis of the appellant's needs arising from autistic spectrum disorder (ASD). On 20 December 2020 the Department decided on the basis of all the evidence that the appellant satisfied the conditions of entitlement to the high rate of the care component of DLA and the low rate of the mobility component from 19 February 2021 to 18 August 2024 inclusive. The appointee sought a reconsideration, submitting further evidence. The decision of 20

December 2020 was reconsidered but not revised. The appointee appealed.

5. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 19 May 2022 the tribunal disallowed the appeal, maintaining the level of entitlement accepted by the Department. The appellant then requested a statement of reasons for the tribunal's decision and this was issued on 25 January 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 April 2023. On 27 May 2023 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant, represented by Mr McGuinness of Advice North West, submitted that the tribunal had erred in law on the basis that:
 - (i) it failed to record material evidence given by the appointee;
 - (ii) it made an irrational decision regarding what is severe mental impairment;
 - (iii) it made an irrational decision regarding what is extreme behaviour.
7. 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 erred in law as alleged and 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 claim form, certificate of appointment, and decisions. It had a submission from the appellant's representative and letters from the appellant's community paediatrician and a special education needs (SEN) assessment from his school. The appellant's mother and his father indicated that they are separated but share the appellant's care. Each attended the hearing and gave oral evidence. The tribunal was told that care component was not disputed. The sole issue was whether an award of high rate mobility was appropriate on the basis of severe impairment of intelligence and social functioning and severe behavioural needs.
9. The tribunal addressed the evidence in the reports submitted by the appellant. These indicated that he had a diagnosis of ASD with significant difficulties with reciprocal social interaction, requiring a fixed and

predictable routine. It was said that he had a high level of supervision needs outdoors as he did not understand dangers, could run away or refuse to move. The tribunal noted that the SEN report indicated that he enjoyed computer games and was beginning to enjoy PE and group games, and showed maturity and a positive attitude. It found that there was no evidence that the appellant displayed any behaviour that could be classified as extreme or that regularly required another person to intervene and physically restrain him in order to prevent them causing physical injury to themselves or others or damage to property. It accepted that this might occur on a rare occasion. However, it found that the relevant test was not satisfied. It retained the award of high rate care and low rate mobility components, but disallowed the appeal as regards high rate mobility component.

Relevant legislation

10. The legislative basis of the mobility component is section 73 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (the 1992 Act). This provides:

73.—(1) Subject to the provisions of this Act, a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the relevant age and throughout which—

...

- (c) he falls within subsection (3) below;

...

(1A) In subsection (1) above “the relevant age” means—

- (a) in relation to the conditions mentioned in paragraph (a), (ab), (b) or (c) of that subsection, the age of 3;

...

- (b) In in relation to the conditions mentioned in paragraph (d) of that subsection, the age of 5.

(3) A person falls within this subsection if—

- (a) he is severely mentally impaired; and
- (b) he displays severe behavioural problems; and
- (c) he satisfies both the conditions mentioned in section 72(1)(b) and (c) above.

...

(6) Regulations shall specify the cases which fall within subsection (3)(a) and (b) above.

...

11. By regulation 12 of the Social Security (Disability Living Allowance) Regulations (NI) 1992 (the DLA Regulations):

(5) A person falls within section 73(3)(a) (severely mentally impaired) if he suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning.

(6) A person falls within section 73(3)(b) (severe behavioural problems) if he exhibits disruptive behaviour which—

- (a) is extreme;
- (b) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property; and
- (c) is so unpredictable that he requires another person to be present and watching over him whenever he is awake.

...

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. For reasons that I will relate below, Mr Clements on behalf of the Department offers some support for the application. In those circumstances, I consider that I should grant leave to appeal.

16. The appellant, represented by Mr McGuinness, firstly submitted that the tribunal had not recorded the evidence accurately. Specifically, he referred to an instance where a piece of evidence in an amended SEN assessment was challenged. This had read: "He is beginning to enjoy taking part in all PE activities including group games". Mr McGuinness submitted that the tribunal had not recorded the appointee's response to this to the effect that, rather than engage in PE, the appellant had caught a bouncing ball one time when standing watching his peers play a ball game. She submitted that he was not included in the game. Whereas the tribunal had generally found the appellant's parents' evidence to be credible, this aspect of disputing the SEN statement was not mentioned in the record of proceedings.
17. For his part, on this ground, Mr Clements accepted that, if the evidence had been given as Mr McGuinness had claimed, it would be an example of the tribunal failing to address a conflict in evidence. However, he also pointed to the general nature of the evidence given by the school, submitting that it indicated more than returning a ball on a single occasion. He referred to the decision of former Chief Commissioner Martin at paragraph 16 of C48/99-00(DLA), where he said that, "there is no obligation to make a verbatim record of all that does occur at a tribunal hearing, although the record should summarise all relevant evidence...". Whereas the tribunal had not referred to the specific response by the appellant's mother to the SEN assessment, it appears to me that it does not amount to a rebuttal of the general theme of the SEN assessment that the appellant had been enjoying group games and joint activity with peers. I do not accept that it amounts to a material error of law.
18. By his second ground, the appellant submitted that the tribunal had not applied the correct statutory test in relation to severe mental impairment. This is the first limb of section 73(3) of the 1992 Act which is further expanded by regulation 12(5) of the DLA Regulations. The statutory requirement for satisfying this limb is that the claimant suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning. Mr McGuinness submitted that this test was satisfied by the appellant.
19. Mr McGuinness points out that the tribunal does not refer to the severe mental disablement test and submits that it was irrational to find that he is not severely mentally impaired. However, Mr Clements observes that the tribunal has not concluded that the appellant is not severely mentally impaired. Mr Clements' observation is consistent with my own observation. I consider that the tribunal has not disallowed the appeal on this limb. It is implicit that it was accepted that it was satisfied on the evidence. Whereas it would have been better to state this expressly, I judge that Mr McGuinness is challenging the tribunal on this point unnecessarily.
20. By his third ground, the appellant submitted that the tribunal had not applied the correct statutory test in relation to severe behavioural

problems. This is the second limb of section 73(3) of the 1992 Act which is further expanded by regulation 12(6) of the DLA Regulations. I consider that the aspect of severe behavioural problems is or should be the real focus of the application, as the basis for the tribunal disallowing the appeal arose from it not being satisfied that the appellant exhibited severe behavioural problems.

21. Mr McGuinness submits on this ground that it was irrational for the tribunal to find that specific evidence regarding the appellant exposing himself did not amount to extreme behaviour, and that it failed to take other evidence in the round. In particular, it was submitted that many of the appellant's behavioural problems were only avoided by his parents or his school providing effective management strategies. He rehearsed a number of instances where there was evidence that the appellant's behaviour would, on his submission, amount to extreme behaviour. He submitted that the number of instances where the appellant would require restraint due to extreme behaviour were reduced only due to the regularity of intervention and restraint. He relied upon the decision in *Secretary of State for Work and Pensions v MG* [2012] UKUT 429 in the Upper Tribunal in Great Britain.
22. Mr Clements for the Department pointed out that under the legislation a claimant displays severe behavioural problems if he exhibits disruptive behaviour which is extreme; regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property; and is so unpredictable that he requires another person to be present and watching over him whenever he is awake. Whereas he acknowledged that the tribunal did not make any finding in relation to the third criterion, he observed that it had found that the first two criteria were not satisfied. The statement of reasons includes the passage below:

“Specifically, the tribunal find that there is no clinical evidence to confirm that the minor appellant displays any behaviour that can be classified as extreme. In addition thereto the tribunal find that the behaviour of the minor appellant is not such that they REGULARLY require another person to intervene and to physically restrain them in order to prevent them from causing physical injury to themselves or others or damage to property. The tribunal find that this, on rare occasions, may occur but that this is not a regular occurrence.”
23. Mr Clements, as indicated above, had some submissions to make in the appellant's interests consistent with the Department's role in these proceedings as an *amicus curiae*. He noted that the tribunal had found that there was no clinical evidence to confirm that the appellant displayed behaviour that was extreme, but had not referred to his father's evidence that he had on one occasion exposed himself in public. He referred me to the decision of Upper Tribunal Judge Church in Great Britain in the case

of *XTC v Secretary of State for Work and Pensions* [2020] UKUT 342. He made a number of criticisms of the present tribunal's decision arising from what was decided in that case.

24. The first point he drew from *XTC* was that the incident of the applicant exposing himself in public was an instance of disruptive behaviour that was extreme, within the meaning of regulation 12(6)(a). I will accept for present purposes that this may be so, and that the tribunal did not expressly refer to it in its findings. However, the test in regulation 12(6) is a conjunctive one, requiring sub-paragraphs (a), (b) and (c) each to be satisfied. As Mr Clements points out, sub-paragraph (b) requires evidence of a requirement for intervention to physically restrain a claimant in order to prevent physical injury to himself or others or damage to property arising from the disruptive behaviour which is extreme. Whether or not it amounts to extreme behaviour, it does not appear to me that the instance of the appellant exposing himself can satisfy that test, as no physical injury or damage would result from that behaviour.
25. Mr Clements referred to other evidence relating to the appellant's behaviour. He noted the submission of the applicant's representative that "He is also running across onto traffic". I note the appellant's father's evidence to the effect that "He would run away ... I can physically hold on to him but my ex-wife cannot. He is unpredictable". I also observe myself that there were references in the representative's submission to the fact that "He will sometimes refuse to walk. He will refuse to leave the car".
26. Mr Clements observes that the tribunal has in general terms accepted that whereas the appellant's behaviour was not such as to require physical intervention and restraint regularly, it did happen on rare occasions. However, he then addresses the meaning of "regularly", again with reference to the Upper Tribunal case of *XTC*. There, Judge Church said at paragraph 39-40 (referring also to the decision of Upper Tribunal Judge Wikeley in *Secretary of State for Work and Pensions v DM* [2010] UKUT 318):
 39. I agree with what I have quoted Judge Wikeley as saying above. I note that none of these authorities seeks to put a figure on how often something must occur for it to be said to occur "regularly". To do so would be unhelpful because what is required is a global appraisal of the situation in all the circumstances. The Tribunal should have considered the Appellant's behaviour as a whole, and made findings as to:
 - a. how often behaviour meeting the other aspects of the threshold set out in regulation 12(6) had occurred (i.e. behaviour that was disruptive and extreme and required intervention and physical restraint to prevent physical injury or damage to property);
 - b. over what period that behaviour occurred; and
 - c. in what circumstances the behaviour occurred.

Then it had to decide, based on those findings, whether the behaviour occurred “regularly”, according to the ordinary meaning of that word.

40. Behaviour which satisfies some but not all of the conditions (e.g. it is disruptive and extreme but doesn’t require intervention and restraint to prevent injury/damage to property, or it is disruptive and requires intervention and restraint to prevent injury/damage to property but isn’t extreme, or it is disruptive and extreme and requires intervention and restraint but only for a purpose other than preventing injury/damage to property, for example to prevent distress) should not be weighed in the balance when assessing how “regularly” behaviour satisfying the conditions occurs”.

27. Mr Clements submits that it is not clear from the statement of reasons what the extreme behaviour exhibited “on rare occasions” actually is. He also observes that the evidence does not indicate how frequently the appellant requires to be restrained to prevent injury to himself or another. He references the SEN assessment that stated that, “[the appellant] displays reduced danger awareness and impulsive behaviours, such as, he will run to avoid the trigger for his anxiety with no understanding of the risks of the environment e.g. traffic ...”. However, there is no mention of how frequently this would occur in the documentary evidence and the tribunal does not appear to have made the necessary enquiries at hearing. In short, he submits that it is not possible to tell how the tribunal reached the conclusion that, whereas the appellant met the relevant test on rare occasions, it was not regularly enough to satisfy regulation 12(6)(b).
28. In the light of the submissions advanced by the parties, I accept that the tribunal has erred in point of law. 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

29 July 2024